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No. 2735

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**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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PACIFIC CASUALTY COMPANY, a Corporation,  
Plaintiff in Error,

vs.

GENERAL BONDING AND CASUALTY IN-  
SURANCE COMPANY, a Corporation,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

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**Filed**

FEB 4 - 1916

**F. D. Monckton,**  
**Clerk.**

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Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
Northern District of California, Sitting at San  
Francisco.*

AT LAW.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Complaint.**

To the Honorable District Court:

General Bonding & Casualty Insurance Company, a private corporation duly incorporated under the laws of the State of Texas, having its domicile in the city and county of Dallas, in said State, and being a citizen of said State, complains of Pacific Coast Casualty Company, a private corporation duly incorporated under the laws of the State of California, having its domicile in the city and county of San Francisco in said State, and being a citizen of said State, and it shows to the Court as follows the grounds of its complaint.

1.

1. On and prior to the 18th day of June, 1911, and thereafter, the defendant was engaged under license duly issued by the commissioner of insurance and banking of the State of Texas in carrying on within the State of Texas its business of casualty and

liability insurance, and Elmo Rock Company, a private corporation duly incorporated under the laws of the State of Texas, was engaged in carrying on within said State and particularly within the county of Kaufman in said State its business of quarrying and crushing rock. The plaintiff then was, and at all times since it has been engaged under license duly issued by the commissioner of insurance and banking of the State of Texas in carrying on within said State its business of acting [1\*] as surety upon appeal bonds and other bonds, and its business of casualty and liability insurance.

2. On, to wit, June 18, 1911, for a valuable consideration, the defendant issued to said Elmo Rock Company a certain policy of employer's liability insurance numbered M. E. 36,696, bearing date June 18, 1911, whereof a copy marked exhibit "A," is attached hereto and made a part of this complaint. By said policy the defendant insured said Elmo Rock Company for the term of one year ending June 18, 1912, and to the extent of five thousand dollars on account of an accident to one person, against loss and expense arising from claims upon said Elmo Rock Company for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of said policy by any employee of said Elmo Rock Company by reason of the prosecution of its work of quarrying and crushing rock, By said policy the defendant further agreed that if suit should be brought against said Elmo Rock

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\*Page-number appearing at foot of page of original certified Record.

Company upon account of an accident the defendant at its own expense would settle or defend such suit whether groundless or not, and that the moneys expended in such defense should not be included in the limits of the liability fixed by said policy. Said Elmo Rock Company duly performed all the conditions of said contract of insurance upon its part both generally and specially with relation to the particular liability hereinafter mentioned, and became entitled to all the benefits thereof both generally and specially with reference to the particular liability hereinafter mentioned.

2.

1. During the period of said policy, one J. B. Sowders, an adult employee of said Elmo Rock Company, accidentally suffered bodily injuries by reason of the prosecution of the work of [2] quarrying and crushing rock by said Elmo Rock Company and by himself as its employee. For the recovery of damages on account of the bodily injuries so suffered or alleged to have been suffered by him, the said J. B. Sowders instituted in the district court of Kaufman County, Texas, an action against said Elmo Rock Company, entitled J. B. Sowders v. Elmo Rock Company, and numbered 5774 upon the docket of said court. Having been duly notified by Elmo Rock Company, entitled J. B. Sowders, v. Elmo Rock Company of the occurrence of such accident and the institution of such action, the defendant undertook to defend such action and took upon itself the entire management and control thereof to the exclusion of said Elmo Rock Company all in accord-



ance with the provisions of said policy. The trial of said action resulted in the rendition therein of June 19, 1912, by said District Court of Kaufman County, Texas, of a money judgment in favor of said J. B. Sowders and against said Elmo Rock Company for the principal sum of five thousand dollars, together with interest thereon at the rate of six per cent, per annum from and after said date and all costs incurred. Said judgment was duly given, and a copy thereof marked exhibit "B" is attached hereto and made a part of this complaint. Thereafter the defendant, through its attorneys at law in charge of the litigation and acting in the name of said Elmo Rock Company, duly moved for a new trial of said action, and their motion was duly overruled on to wit, July 19, 1912.

2. By a law of the State of Texas then in force, to wit by article 3715 of the Revised Civil Statutes of the State of Texas of 1911, it was made the duty of the clerk of the court to issue an execution upon said judgment upon the application of the successful party thereto after the expiration of twenty days from the rendition of said judgment and after the [3] overruling of said motion for new trial unless a supersedeas bond on appeal or writ of error should have been theretofore filed and approved. By another law of the State of Texas then in force, to wit by articles 2101 to 2103 inclusive, of said Revised Civil Statutes, said Elmo Rock Company, or the defendant acting in its name, was enabled to suspend the execution of said judgment pending its appeal therefrom by giving a supersedeas appeal

bond with two or more good and sufficient sureties, to be approved by the clerk of the court and payable to the appellee, in a sum at least double the amount of the judgment, interest and costs, conditioned that the appellant should prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals should be against it it should preform such judgment, sentence or decree and pay all such damages as said Court might award against it. By another law of the State of Texas then in force, to wit, by article 4929 of said Revised Civil Statutes, it was provided that such supersedeas appeal bond might be signed by a duly qualified surety company, such as was the plaintiff, instead of by two or more good and sufficient sureties as required by said article 2101. A copy marked exhibit "C" of said laws, to wit of said articles 3715, 2101 to 2103, inclusive and 4929 of the Revised Civil Statutes of the State of Texas of 1911, is hereto attached and made a part of this complaint.

3. Acting under the compulsion of said laws and of its obligations to said Elmo Rock Company under the terms of said policy, the defendant took steps to appeal from said judgment and to suspend the execution thereof pending such appeal, acting in so doing in the name of said Elmo Rock Company and [4] through its attorneys at law, Messrs. Meador & Davis, in charge of the litigation, and especially through John Davis, a member of said firm of Meador & Davis. To that end the defendant, acting through its said agent and attorney John Davis, who as the plain-

tiff is informed and believes, and therefore so alleges, was thereunto authorized, applied to the plaintiff to execute as surety the supersedeas appeal bond of said Elmo Rock Company in said action, and to induce the plaintiff to execute such bond it made and delivered to the plaintiff a contract of indemnity, whereof a copy marked exhibit "D" is attached hereto and made a part of this complaint. By said contract of indemnity the defendant agreed and bound itself to indemnify the plaintiff and keep it indemnified against any and all loss, costs, charges, counsel fees, damages and expenses whatever which the plaintiff should or might sustain, incur or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety. The plaintiff is informed and believes and so alleges, the defendant with full knowledge of the acts of the said John Davis taken in its behalf as aforesaid approved such act, accepted the benefits thereof and ratified the same. The plaintiff is informed and believes and so alleges, the defendant held out the said John Davis to the plaintiff as having authority to deal with it in the usual course of business with reference to the matter of obtaining from it the execution of such supersedeas appeal bond and indemnifying the plaintiff against loss thereby incurred, and the plaintiff without notice of any defect in the authority of the said John Davis dealt with him in the usual course of business and in reliance upon the authority which he apparently possessed, and executed said supersedeas appeal bond in consideration [5] of the making of said con-



tract of indemnity and the payment by the defendant or in its behalf of the premium charged by the plaintiff for the making of such supersedeas appeal bond.

4. In consideration of the premium paid to it by or in behalf of the defendant therefor and in consideration of the execution and delivery to it of the aforesaid contract of indemnity, the plaintiff executed and delivered to the defendant's said attorneys at law for their use in appealing from the judgment hereinbefore described and in suspending the same, a supersedeas appeal bond in said action signed by itself as surety and through the procurement of the defendant signed by said Elmo Rock Company as principal, which bond was duly approved by the clerk of the court and filed among the papers of said action, rendering the appeal from and the suspension of said judgment effective. A copy of said bond and of the endorsed approval and file mark of the clerk of the court is marked exhibit "E" and attached hereto, and made a part of this complaint.

5. The appeal perfected as aforesaid was duly prosecuted by the defendant in the name of Elmo Rock Company and through the agency of its said attorneys at law, Meador & Davis. In the course of such appeal said judgment was affirmed by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on to wit, March 15, 1913. On to wit, May 28, 1913, the Supreme Court of Texas denied a writ of error for which the defendant in the name of Elmo Rock Company had made application for the revision of said judgment of affirmance,



and on to wit, June 27, 1913, it overruled a motion for the rehearing of said application for writ of error. A copy of the judgment of the Supreme Court marked exhibit "F" is attached hereto, and made a part of this complaint. A copy of the judgment of the Supreme Court having been filed on to wit, July 5, 1913, in the office of [6] the clerk of said Court of Civil Appeals, said Court on to wit, August 12, 1913, duly issued its mandate to the said District Court of Kaufman County, commanding it to observe the order of said Court of Civil Appeals. Said order was in the nature of a judgment of affirmance of the judgment of said District Court hereinbefore set forth, with the additional judgment that the appellee J. B. Sowders have and recover from the appellant Elmo Rock Company and from the plaintiff, as its surety upon appeal bond, the amount adjudged below and all costs. Said mandate was duly filed in the office of the clerk of the District Court of Kaufman County, Texas, on to wit, August 18, 1913, and then for the first time the afore-said judgment in favor of J. B. Sowders and against Elmo Rock Company became final in the sense that payment thereof was required and enforceable. A copy of said mandate and of the file mark of the clerk of the District Court of Kaufman County, Texas, thereon, marked exhibit "G," is attached hereto and made a part of this complaint.

6. Thereafter on to wit, August 19, 1913, a writ of execution was duly issued out of said District Court of Kaufman County, Texas, for the collection of said judgment and interest and costs, and on to

wit, September 5, 1913, the sheriff of Kaufman County, Texas, duly levied said execution upon a large amount of real and personal property as the property of said Elmo Rock Company, and advertised such property for sale at the door of the courthouse of Kaufman County on the 7th of October, 1913. Thereafter, without having sold the same, the sheriff turned said property over to W. D. Fletcher, as receiver for said Elmo Rock Company under orders of the District Court of Kaufman County, Texas, and made return of the writ of execution accordingly, also returning that no property of this plaintiff was found in his [7] county. Thereafter an *alias* writ of execution was duly issued out of the District Court of Kaufman County, commanding the sheriff of Dallas County to make the amount of said judgment and interest and costs out of the property of this plaintiff.

7. Thereafter, within ninety days from the date of the filing of mandate in said action in the District Court of Kaufman County, as hereinbefore set forth, and on to wit, October 22, 1913, at the instance and request of Elmo Rock Company acting through its said receiver W. D. Fletcher, and in behalf of said Elmo Rock Company, and under compulsion of the judgment rendered against this plaintiff in said action and said *alias* writ of execution issued against it, all as hereinbefore set forth, the plaintiff herein paid to the owners of said judgment in full settlement of the principal and interest thereof the sum of five thousand four hundred dollars and fifty cents, and in addition paid to the officers of court the taxed

costs in said action in the sum of one hundred sixty dollars and forty cents, making the aggregate sum of five thousand five hundred sixty dollars and ninety cents paid by the plaintiff in full settlement and discharge of said judgment and interest and costs thereto appurtenant.

## 3.

1. On to wit, September 17, 1913, the District Court of Kaufman County, Texas, in the cause entitled Mrs. Nellie Whitfield, Administratrix, vs. Elmo Rock Company et al., and numbered 6007 upon the docket of said court, duly gave an order appointing W. D. Fletcher receiver of said Elmo Rock Company, and directed that upon his taking the oath required by law and filing a sufficient bond in the sum of two thousand five hundred dollars, [8] which he did on to wit, September 20, 1913, he take possession of all the assets and properties of said Elmo Rock Company of every kind and character, and hold the same subject to the further order of said court. A copy of said order marked exhibit "H" is attached hereto, and made a part of this complaint. Thereafter, on to wit, October 31, 1913, and in said receivership suit last above mentioned, said District Court of Kaufman County, Texas, duly gave an order authorizing said receiver to assign and deliver to the plaintiff herein the policy of employer's liability insurance issued by the defendant herein and hereinbefore set forth. A copy of said order marked exhibit "I" is attached hereto, and made a part of this complaint. Thereafter, on

to wit, November 4, 1913, in pursuance of and by authority of the order of court last above mentioned, and in consideration of the payment theretofore made of said judgment by the plaintiff herein in behalf of said Elmo Rock Company, said W. D. Fletcher, as receiver for said Elmo Rock Company, duly assigned and transferred to the plaintiff herein the said policy of employer's liability insurance; and the plaintiff is now the owner and holder of said policy and of all the rights of said Elmo Rock Company thereunder. A copy of said assignment marked exhibit "J" is attached hereto, and made a part of this complaint.

4.

1. Thereafter, on to wit, November 28, 1913, the plaintiff caused to be presented to the defendant for payment a draft drawn by the plaintiff in favor of Locke & Locke upon the defendant for said sum of five thousand five hundred sixty dollars and ninety cents in full settlement of all obligations under said liability policy and under said contract of indemnity, both of which were attached to said draft. The defendant refused to pay said draft, and the same was duly protested by W. [9] W. Healey, a notary public in and for the city and county of San Francisco, State of California, on said date, November 28, 1913. A copy of said draft marked exhibit "K," and a copy of the certificate of protest marked exhibit "L," are attached hereto and made parts of this complaint.

5.

1. The contract of liability insurance and the



contract of indemnity hereinbefore set out were made in the State of Texas, and when they were made it was provided by a law of the State of Texas that on all written contracts ascertaining the sum payable when no specified rate of interest should be agreed upon by the parties to the contract, interest should be allowed at the rate of six per cent per annum from and after the time when the sum became due and payable. A copy of said law, to wit, of article 4977 of the Revised Civil Statutes of the State of Texas of 1911, marked exhibit "M" is attached hereto and made a part of this complaint.

## 6.

In consideration of the premises the plaintiff prays that the defendant be duly summoned to appear and answer this complaint, and that upon final hearing the plaintiff have judgment against the defendant for its debt and interest and costs i. e. for the sum of five thousand five hundred sixty dollars and ninety cents, with interest thereon at the rate of six per cent per annum from and after October 22, 1913, and the further sum of five dollars paid by the plaintiff as protest fees, and all costs of suit, and the plaintiff prays that it have all different or additional relief to which it may be justly entitled.

R. S. GRAY,

LOCKE & LOCKE,

Attorneys for Plaintiff.

Office, Room 342,

Mills Bldg.,

San Francisco, Calif. [10]

The State of Texas,  
County of Dallas.

John B. Stephenson, first having been duly sworn,  
upon his oath says :

I am an officer, to with the president of General Bonding & Casualty Insurance Company, which is a private corporation incorporated under the laws of the State of Texas, and have read its foregoing complaint against Pacific Coast Casualty Company. Said complaint is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

JOHN B. STEPHENSON.

Sworn to and subscribed by John B. Stephenson  
before me, this the 22d day of December, 1913.

[Seal]

DANIEL K. SADLER,

Notary Public, Dallas County, Texas.

My commission expires June 1, 1915. [11]

**Exhibit "A" [to Complaint—Policy of Insurance].**

"No. M. E. 36696.

CAUSUALTY INSURANCE.

PACIFIC COAST CASUALTY COMPANY OF  
CALIFORNIA.

IN CONSIDERATION of the warranties herein  
and of Eighty-four and 00/100 Dollars (\$84.00)  
estimated premium, the PACIFIC COAST CASU-  
ALTY COMPANY, of San Francisco, California,  
hereinafter called the Company, Hereby Insures  
THE ELMO ROCK COMPANY of the County of

Kaufman, State of Texas, hereinafter called the Assured, AGAINST LOSS AND EXPENSE ARISING FROM CLAIMS UPON THE ASSURED FOR DAMAGES ON ACCOUNT OF BODILY INJURIES ACCIDENTLY SUFFERED OR ALLEGED TO HAVE BEEN SUFFERED DURING THE PERIOD OF THIS POLICY BY ANY EMPLOYEE OF THE ASSURED by reason of the prosecution of the work described herein.

THIS INSURANCE IS SUBJECT TO THE FOLLOWING CONDITIONS:

A. The Company's liability on account of an accident to one person is limited to FIVE THOUSAND AND 00/100 dollars (\$5,000); and, subject to the same limit for each person, the Company's total liability for an accident to more than one person is limited to TEN THOUSAND 00/100 dollars (\$10,000).

B. Upon the occurrence of an accident the Assured shall give to the Company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable; and the Company, at its own expense, will make such investigation as it may deem necessary.

If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same.

If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent,

every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company.

Co-operation.  
of Assured. C. The Assured shall render to the Company at all times all co-operation and assistance in his power. [12]

D. The premium for this policy is based on the entire compensation earned during the period of this policy by all employees of the Assured, engaged in the business or occupation herein stated not specifically excepted. Said entire compensation shall include salaries, wages, piece-work, over-time and allowances, whether paid wholly or in part by cash, store certificates, board, rentals, merchandise, credit or any other substitute for cash. At the end of the policy period, the Assured shall furnish the

Basis of Premium. Company a written statement of the amount of said entire compensation earned by the employees. If such entire compensation exceeds the amount of the estimated compensation set forth herein, the Assured shall immediately pay the Company the balance of premium earned calculated on said excess at the rate named herein. If such entire compensation is less than the amount of said estimated compensation, the Com-



pany shall pay the Assured the unearned premium calculated on the difference at the rate named herein; but the Company in any event shall retain the minimum premium stated herein.

E. Whenever requested the Assured shall furnish the Company a written statement of the amount of compensation earned by his employees during any part of the policy period. The Company shall have the right and be given opportunity at all reasonable times to examine all books and records of the Assured relating to the compensation earned by his employees, provided said examinations are made within one year from the expiration of the policy period. The rendering of any estimate or statement of compensation earned by employees or the payment of any premium estimated thereon, or the giving of any receipt for the payment of premium so estimated, shall not bar the examinations herein provided for, nor the right of the Company to the full amount of premium earned.

F. This policy may be cancelled by either of the parties hereto, upon written notice stating a date not less than five (5) days thereafter when cancellation shall be effective. Said date shall then be the end of the policy period and the premium shall be computed and adjusted as provided in Clause D. hereof. If said cancellation is at the request of the Assured and he is not retiring from the business described herein the premium shall be calculated at the customary short rate. Whenever cancellation is at the request of the Assured, the Company is entitled to not less than the

Pay-roll  
Reports  
and Credits.

Cancellation.

minimum premium stated herein.

G. The following statements numbered 1 to 9 inclusive are warranties by the Assured and are hereby made a part of and the basis of this contract, the estimated compensation of employees excepted.

1. Name of Assured—The Elmo Rock Company.

2. Address of Assured—Terrell, Texas.

3. The business or occupations to be insured: the specific location where work is to be done; the estimated compensation of the employees in each business or occupation; and the premium rate to be paid thereon are as follows: [13]

Business or Occupation.	Specific Location Where Work is to be Done.	Estimated Compensation.	Premium Rate.	Amount of Estimated Premium.
Quarrying and crushing rock.	Elmo, Texas	\$4,200	2%	\$84.00

NOTE.—If any employees shall be engaged in work which is of a greater hazard (judged by the rating in the Manual then in use by the Company) than the business or occupations above described, payment shall be made for said work at the premium rate provided for the same in said Manual; but ordinary alterations, additions and repairs are covered by this policy.

4. This policy covers, and the compensation specified above includes the compensation of drivers, drivers' helpers, collectors and messengers at or away from the locations above specified, cooks, helpers, common laborers, engineers, clerks, superintendents, officers (if a corporation) and all employed in connection with the above business or occupations, in any manner whatsoever, excepting: Officers.

5. No explosives or chemicals are used except as follows: 40% Dynamite and Gang Blasting Rock.

6. There are no elevators on the premises except as follows: No elevators.

7. There are no boilers on the premises except as follows: One 40 H. P.

8. This risk was carried during the past year by New risk.

9. This risk has never been refused or cancelled except as follows: No exceptions.

H. This policy does not cover accidents  
Exceptions. to or caused by any minor employed in violation of law.

I. The Assured agrees that the Com-  
Audit. pany may audit his books and records as to compensation of employees, if done within one year after termination of the policy.

J. The minimum premium for this pol-  
Mimumum Premium. icy shall be twenty-five and 00/100 dollars (\$25.00).

K. This policy shall not be altered ex-  
Alterations. Agents. cept by written endorsement signed by the President or Secretary of the Company, and attached hereto. Notice to an agent or knowledge possessed by an agent, or other person shall not effect a waiver or change in this policy. No person shall be deemed an agent of the Company unless authorized in writing by the Company.

L. No action shall lie against the Com-  
Right of Recovery. pany for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction

of a final judgment, within ninety days from the date of said judgment and after trial of the issue.

[14]

Policy  
Period. M. The period of this policy shall be from the Eighteenth day of June, 1911, at noon, to the Eighteenth day of June, 1912, at noon, standard time, at the place where this policy is executed.

IN WITNESS WHEREOF, the PACIFIC COAST CASUALTY COMPANY has caused this Policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

F. A. ZANE,

Secretary.

E. F. GREEN,

President.

Countersigned at Dallas, Texas, this 18th day of June, 1911.

MILLER-STEMMONS CO.,

General Agent."

The following clauses are pasted as riders on the first page of the policy.

"FORM L-23 9-10-1000

FIRST MEDICAL AID ENDORSEMENT

No. 5538

Date June 18th, 1911.

The final sentence of the last paragraph of Clause 'B' of this policy is hereby amended to read as follows:

"The Assured shall not assume any liability, nor interfere with any negotiation for settlement, or



any legal proceeding, nor incur any expense nor settle any claim, except at his own cost, without the written consent of the Company, except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident.'

Attached to and forming part of Policy No. M. E. 36696 issued by the PACIFIC COAST CASUALTY COMPANY, OF SAN FRANCISCO, CALIFORNIA, to The Elmo Rock Company.

Countersigned:

MILLER-STEMMONS CO.,

General Agent.

E. F. GREEN,

President."

FORM L-46 10-10-2000

No. 1948.

COMPENSATION LAW ENDORSEMENT

Date June 18th, 1911.

PACIFIC COAST CASUALTY COMPANY OF  
CALIFORNIA.

IN CONSIDERATION of the rate at which this Policy is written it is hereby understood and agreed that this Policy does not cover loss from the liability of the Assured under any Workmen's Compensation Law now existing, or hereafter enforced, during the term of this Policy.

Attached to and forming part of Policy No. M. E. 36696 issued by the PACIFIC COAST CASUALTY COMPANY, OF SAN FRANCISCO, CALIFOR-

NIA, to The Elmo Rock Company.

COUNTERSIGNED:

MILLER-STEMMONS CO.,

General Agent.

E. F. GREEN,

President." [15]

**Exhibit "B" [to Complaint—Judgment].**

*In District Court, Kaufman County, Texas.*

May Term, 1912.

June 19th, 1912.

No. 5774.

"J. B. SOWDERS

vs.

ELMO ROCK CO.

This day came on to be heard the above-entitled cause, and both parties having announced ready for trial, came a jury of good and lawful men, to wit, J. E. Barrett and eleven others who being duly sworn and empaneled according to law, who after hearing the pleadings read and all the evidence and argument of counsel, and after receving the charge of the Court retired to consider of their verdict; and after due deliberation thereon, returned into open court the following verdict, to wit: 'We, the jury, find for the plaintiff the sum of Five Thousand & no/100 Dollars (\$5,000).

J. E. BARRETT,

Foreman.

It is therefore ordered, adjudged, and decreed by the Court that the plaintiff J. B. Sowders, do have and recover of defendant, Elmo Rock Company, the sum of Five Thousand Dollars with six per cent in-

terest per annum thereon from this date, together with all cost incurred herein, for which execution may issue.” [16]

**Exhibit “C” [to Complaint—Statutes].**

Revised Civil Statutes of the State of Texas of 1911.

Article 3715. “Execution before adjournment, when.—After the expiration of twenty days from and after the rendition of a final judgment in the District or County Court, and after the overruling of any motion therein for a new trial or in arrest of judgment, if no supersedeas bond on appeal or writ of error has been filed and approved, the clerk shall issue execution upon such judgment upon the application of the successful party.”

Article 2101. “Supersedeas bond.—Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving, instead of the bond or affidavit in lieu thereof mentioned in the four preceding articles, or in addition to such bond, a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to appellee or defendant in error, in a sum at least double the amount of the judgments, interest and costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect; and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against him.”

Article 2102. “Supersedeas bond.—Where judgment is for land or other property.—Where the

judgment is for the recovery of land or other property, the bond shall be further conditioned that the appellant or plaintiff in error shall, in case the judgment is affirmed, pay to the appellee or defendant in error the value of the rent or hire of such property in any suit which may be brought therefor."

Article 2103. "Judgment stayed and execution superseded.—Upon the filing of the bonds mentioned in the two preceding articles, the appeal or writ of error shall be held to be perfected, and the execution of the judgment shall be stayed, and should execution have been issued thereon, the clerk shall forthwith issue a supersedeas."

Article 4929. "Surety Company's bond is a legal bond, when.—Whenever any bond, undertaking, recognizance or other obligation is, by law or the charter, ordinances, rules or regulations of a municipality, board, body, organization, court, judge, or public officer, required or permitted to be made, given, tendered or filed with the surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company, qualified as hereinafter provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of every law, charter, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one



or more sureties, or that such sureties shall be residents, or householders, or freeholders, or either, or both, or possess any other qualification; provided, that nothing herein shall be construed [17] to permit any corporation to become a surety upon the official bond of any state or county official in this State and all courts, judges, heads of departments, boards, bodies, municipalities and public officers of every character shall accept and treat such bond, undertaking, obligation, recognizance or guaranty, when so executed by such company, as conforming to, and fully and completely complying with, every requirement of every such law, charter, ordinance, rule or regulation.” [18]

**Exhibit “D” [to Complaint—Contract of Indemnity].**

“The State of Texas,  
County of Dallas.

Whereas, heretofore, to wit, on the — day of —, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrell, Texas, an employer’s liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and

Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work

described in said policy; and, whereas the said J. B. Sowders, brought suit against said rock company and recovered a judgment of \$5,000 in the District Court of Kaufman County, Texas; and whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas a supersedeas bond of \$11,000 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain, incur or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

Witness its hand, this 6th day of August, 1912.

PACIFIC COAST CASUALTY COMPANY.

By JOHN DAVIS,

Its Attorney at Law and in Fact." [19]

**Exhibit "E" [to Complaint—Bond].**

*In the District Court of Kaufman County, State of  
Texas.*

No. 5774.

**"J. B. SOWDERS**

**VS.**

**ELMO ROCK COMPANY.**

Whereas, in the above-entitled and numbered cause, pending in the District Court of Kaufman County, Texas, and at a regular term of said court, to wit, on the 18th day of June, A. D. 1912, the said J. B. Sowders recovered judgment against the said Elmo Rock Company for the sum of Five Thousand Dollars, with interest thereon from the 18th day of June, A. D. 1912, at six per cent per annum, and all costs of suit; and Whereas, on the 19th day of July, A. D. 1912, a motion theretofore filed by the said Elmo Rock Company praying for a new trial was overruled, to which action of the Court the said Elmo Rock Company, then and there excepted and gave notice of appeal to the Court of Civil Appeals of the 5th Supreme Judicial District at Dallas, Texas, and from which judgment the said Elmo Rock Company has taken an appeal to the Court of Civil Appeals for the 5th Supreme Judicial District at Dallas, in the County of Dallas,—

Now, therefore, we Elmo Rock Company, as principal, and ——— General Bonding & Casualty Ins. Co., as sureties, acknowledge ourselves bound to pay

said J. B. Sowders, the sum of Eleven Thousand Dollars, conditioned that the said Elmo Rock Company, a Corporation, appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it, the said Elmo Rock Company, shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

Witness, our hands this the 6th day of August,  
A. D. 1912.

(L.S.)

ELMO ROCK COMPANY.

By J. B. WHITFIELD,

Pres.

GENERAL BONDING & CASUALTY INS.  
CO.

By J. B. STEPHENSON,

President.

I have fixed the probable amount of costs of this suit in the Court of Civil Appeals, the Supreme Court and the court below at \$200 and approve the foregoing bond.

This the 7th day of August, A. D. 1912.

L. D. SCARBOROUGH,

Clerk of the District Court Kaufman County, Texas.

Filed Aug. 7th, 1912. L. D. Scarborough, District Clerk Kaufman County, Texas." [20]



**Exhibit "F" [to Complaint—Order Refusing  
Application for Writ of Error, etc.].**

*"In Supreme Court of Texas, from Kaufman County,  
Fifth District.*

**ELMO ROCK COMPANY**

**vs.**

**J. B. SOWDERS.**

**May 28, 1913.**

This day came on to be heard the application of Elmo Rock Company, for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant Elmo Rock Company and its surety, General Bond & Casualty Insurance Company, pay all costs incurred on this application.

I, F. T. CONNERLY, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above-styled cause.

Witness my hand and seal of said court, this the 30th day of June, A. D. 1913.

[Seal]

**F. T. CONNERLY,**

**Clerk.**

By \_\_\_\_\_,

**Deputy."**

**Motion for rehearing overruled June 27, 1913.**

[Endorsed as follows]: "Application No. 8202. Elmo Rock Company vs. J. B. Sowders. Copy of Judgment in Supreme Court Application for Writ of Error Refused. Filed in Court of Civil Appeals Jul. 5, 1913. Geo. W. Blair, Clerk 5th District."  
[21]

**Exhibit "G" [to Complaint—Mandate].**

**"THE STATE OF TEXAS.**

To the District Court of Kaufman County, Greeting:

Before our Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, on the 15th day of March, A. D. 1913, the cause upon appeal to revise or reverse your Judgment between Elmo Rock Co., Appellant, No. 6840, and J. B. Sowders, Appellee, was determined; and therein our said Court made its order in these words:

'This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee J. B. Sowders do have and recover of appellant Elmo Rock Company and General Bonding and Casualty Insurance Company its surety upon appeal bond the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance';

WHEREFORE, WE COMMAND YOU to observe the order of our said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, in this

behalf, and in all things have it duly recognized, obeyed and executed.

WITNESS, the Hon. ANSON RAINEY, Chief Justice of our said Court of Civil Appeals, with the seal thereof annexed, at the city of Dallas, this the 12th day of August, A. D. 1913.

[Seal]

GEO. W. BLAIR,  
Clerk.

By \_\_\_\_\_,  
Deputy."

[Endorsement as follows]: "No. 6840. Mandate Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, Dallas. Elmo Rock Co. vs. J. B. Sowders, Issued August 12, 1913. Geo. W. Blair, Clerk. Filed Aug. 18, 1913. By W. W. Franklin, Dist. Clerk to Kaufman County." [22]

**Exhibit "H" [to Complaint—Order Appointing Receiver].**

*In the District Court of Kaufman County, Texas.*

Sept. Term, A. D. 1913.

No. —.

MRS. NELLIE WHITFIELD, Administratrix,  
vs.

ELMO ROCK COMPANY et al.

The following order is endorsed on the petition in the above-entitled case.

"Sept. 17th, 1913.

This day came on to be heard the application of Mrs. Nellie Whitfield, administratrix of the estate of J. B. Whitfield, deceased, praying for the appoint-

ment of a Receiver for The Elmo Rock Company, a corporation duly organized under the laws of Texas and having its principal place of business at Elmo in Kaufman County, Texas; and it appearing to the Court from allegations in petition that said Elmo Rock Company is insolvent and that its assets are being wasted and dissipated and that there is no officer or other proper person in charge of the affairs of said corporation and that it is necessary that some one should be placed in charge thereof to preserve the property and wind up the business of said corporation; and it further appearing to the Court from said petition that said Elmo Rock Company is largely indebted; and it further appearing to the Court that W. D. Fletcher, a citizen of Terrell, Kaufman county, Texas, is a proper person to be appointed Receiver for said corporation:

It is therefore ordered by the Court that said W. D. Fletcher be, and he is hereby, appointed Receiver of said Elmo Rock Company, and his bond as such Receiver is fixed at the sum of \$2,500; it is further ordered by the Court that upon the said W. D. Fletcher filing in this court his said bond with two good and sufficient sureties to be approved by this Court and taking the oath required by law, that he take possession of all the assets and properties of said The Elmo Rock Company of every kind and character, and that he hold same subject to the further orders of this Court.

F. L. HAWKINS,  
Judge 40th Judicial District. [23]



**Exhibit "H-2" [to Complaint—Bond of Receiver].**

The State of Texas,  
County of Kaufman.

KNOW ALL MEN BY THESE PRESENTS: That we, W. D. Fletcher, as principal, and Commonwealth Bonding & Casualty Ins. Co., as sureties, are held and firmly bound unto F. L. Hawkins, Judge of the 40th Judicial District of Texas, in the penal sum of Twenty-five Hundred (\$2,500) Dollars, for the payment of which well and truly to be made, we herby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas, the said W. D. Fletcher has been appointed by Hon. F. L. Hawkins, Judge of the 40th Judicial District of Texas, Receiver for the Elmo Rock Company, in the action of Mrs. Nellie Whitfield, Administratrix, vs. The Elmo Rock Company.

Now, if the said W. D. Fletcher shall faithfully discharge all of the duties of Receiver in said action, and obey *to* orders of the Court therein, then this obligation shall be null and void, otherwise to remain in full force and effect.

Witness our hands, this 19th day of September, A. D. 1913.

W. D. FLETCHER,  
Commonwealth Bonding & Casualty Ins. Co.  
By CLARENCE G. COFFEY,  
Attorney in Fact.

The State of Texas,  
County of Kaufman.

I, W. D. Fletcher, Receiver of The Elmo Rock Company, solemnly swear that I will faithfully perform all the duties of Receiver of said Elmo Rock Company, to the best of my skill and ability.

[Seal] W. D. FLETCHER.

Subscribed and sworn to before me, this the 18th day of September, A. D. 1913.

C. G. COFFEY,

Notary Public, Kaufman County, Texas.

Filed Sept. 20th, 1913, W. W. Franklin, District Clerk." [24]

**Exhibit "I" [to Complaint—Order Authorizing Assignment].**

No. 6007.

"MRS. MATTIE WHITFIELD, Administratrix,  
vs.  
ELMO ROCK COMPANY.

*In District Court Kaufman County, Texas,*  
Oct. 31, 1913.

The Receiver of the Elmo Rock Company heretofore appointed by the Court is authorized by said Court to assign and deliver to the General Bonding and Casualty Insurance Company Policy No. M. E. 36,696 issued by the Pacific Coast Casualty Company to the Elmo Rock Company.

State of Texas,  
Kaufman County.

I, W. W. Franklin, Clerk of the District Court of

Kaufman County, Texas, do hereby certify that the foregoing is a true and correct copy of the order entered on the 31st day of October, A. D. 1913, in the case of Mattie Whitfield vs. Elmo Rock Company.

Witness my hand and seal of office this the 4th day of November, 1913.

(L. S.)

W. W. FRANKLIN,

Clerk District Court Kaufman County, Texas."

[25]

**Exhibit "J" [to Complaint—Assignment].**

"The State of Texas,  
County of Kaufman.

WHEREAS, under date of June 18, 1911, Pacific Coast Casualty Company, a private corporation of San Francisco, California, for a valuable consideration executed and delivered to Elmo Rock Company, a private corporation of Kaufman County, Texas, its certain liability policy No. M. E. 36,696, whereby it insured said Elmo Rock Company for the term of one year against loss and expense arising from claims upon it for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of said policy by any employee of said Elmo Rock Company, by reason of the prosecution of its work of quarrying and crushing rock. And whereas, on to wit, June 19, 1912, in the District Court of Kaufman County, Texas, in the cause entitled J. B. Sowders v. Elmo Rock Company, and numbered 5774 upon the docket of said court, said J. B. Sowders recovered against said Elmo Rock Company a money judgment for the sum of five thousand dollars, together with interest from and after

said date at the rate of six per cent, per annum, and all costs of suit. And whereas, the cause of action upon which said judgment was recovered was based upon bodily injuries accidentally suffered, or alleged to have been suffered by said J. B. Sowders during the period of said policy, and while as an employee of said Elmo Rock Company he was engaged in the prosecution of its work of quarrying and crushing rock. And whereas, said Elmo Rock Company appealed from said judgment to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, and in connection with such appeal gave a supersedeas appeal bond in the sum of eleven thousand dollars executed by itself as principal and by General Bonding & Casualty [26] Insurance Company as surety. And whereas, said judgment in due course was affirmed by said Court of Civil Appeals, and a writ of error therefrom was denied by the Supreme Court of Texas. And whereas, on to wit, August 18, 1913, a mandate issued by said Court of Civil Appeals under date of August 12, 1913, was filed in the District Court of Kaufman County, Texas, and the judgment aforesaid of said District Court thereupon became final and binding. And whereas, on to wit, September 17, 1913, in a cause then pending in the District Court of Kaufman County, Texas, and entitled Mrs. Nellie Whitfield, administratrix, v. Elmo Rock Company, and numbered 6007 upon the docket of said court, W. D. Fletcher, of Terrell, Kaufman County, Texas, was by said court duly appointed receiver of said corporation, and directed to take possession of all the assets and properties of said Elmo



Rock Company of every kind and character, and hold the same subject to the further orders of said court. And whereas, said W. D. Fletcher has duly qualified by taking the oath of office and filing an approved bond in accordance with the requirements of the aforesaid order appointing him receiver, and is now the duly appointed, qualified and acting receiver in said cause. And whereas at the request of said W. D. Fletcher as receiver and in the discharge of its obligations as surety upon the supersedeas appeal bond aforesaid, said General Bonding & Casualty Insurance Company has on this 22d day of October, 1913, paid to the owners and holders of said judgment the amount due them thereon, to wit, the sum of five thousand four hundred dollars and fifty cents, and in addition has paid to the officers of court the costs taxed in said cause, to wit, the sum of one hundred sixty dollars and forty cents, thereby discharging said judgment in full as between said Elmo Rock Company and the owners and holders of said judgment other than said *said* General Bonding & Casualty Insurance Company itself. And whereas, [27] by virtue of the premises said General Bonding & Casualty Insurance Company has become subrogated to all the securities held by said Elmo Rock Company for the payment of the indebtedness represented by said judgment, and has become entitled to have all such securities duly transferred and assigned to it. And whereas, said W. D. Fletcher, as receiver, has been authorized and instructed by order of the District Court of Kaufman County, Texas, to assign and transfer said liability policy to said General

Bonding & Casualty Insurance Company, the same being a security held by Elmo Rock Company for the payment of the debt represented by said judgment.

Now, therefore, I, W. D. Fletcher, receiver for Elmo Rock Company, acting in its behalf, and under order of the District Court of Kaufman County, Texas, as aforesaid, do hereby assign, transfer and set over unto General Bonding & Casualty Insurance Company, a private corporation of Dallas, Texas, the said liability policy number ME. 36,696, issued by Pacific Coast Casualty Company under date of June 18, 1911, to the Elmo Rock Company, together with all the right, title and interest of said Elmo Rock Company in and to said policy. This assignment is made without prejudice to any right which said General Bonding & Casualty Insurance Company may have against said Elmo Rock Company for its reimbursement otherwise than by means of said policy for the amount expended by it in the payment of said judgment, interest and costs.

In testimony whereof I have hereunto set my hand at Kaufman, Texas, this the 4th day of November, 1913.

W. D. FLETCHER,

Receiver for Elmo Rock Company. [28]

State of Texas,  
County of Kaufman.

Before me, C. G. Coffey, a notary public in and for Kaufman County, Texas, on this day personally appeared W. D. Fletcher, known to me to be the person whose name is subscribed to the foregoing instrument of writing, and acknowledged to me that he execute

the same for the purposes and consideration and in the capacity therein stated.

Given under my hand and the seal of my office at Terrell, in Kaufman County, Texas, this the 4th day of November, 1913.

[Seal]

C. G. COFFEY,  
Notary Public, Kaufman County, Texas. [29]

**Exhibit "K" [to Complaint—Draft].**

Dallas, Texas, November 18, 1913,  
Law Office of LOCKE & LOCKE, Dallas, Texas.

PAY TO THE ORDER OF Locke & Locke, on November 28, 1913, fixed \$5,560.90, Five Thousand Five Hundred Sixty and 90/100 Dollars in full settlement of all obligations under your liability policy No. M. E. 36,696 issued June 18, 1911, to Elmo Rock Company and of your agreement of August 6, 1912, to indemnify General Bonding & Casualty Insurance Company for any loss incurred in consequence of its signing as surety a supersedeas appeal bond in the case of Sowders v. Elmo Rock Company, both policy and indemnity agreement being attached hereto.

**GENERAL BONDING & CASUALTY INSURANCE COMPANY.**

By J. B. STEPHENSON,  
President.

To Pacific Coast Casualty Company,  
San Francisco,  
California." [30]

**Exhibit "L" [to Complaint—Certificate of Protest].**

"United States of America,  
State of California,  
City and County of San Francisco,—ss.

By this Public Instrument of Protest

**BE IT KNOWN,**

That on this 28th day of November, 1913, at request of

**THE CROCKER NATIONAL BANK,**

of San Francisco,

holder of the original draft which is hereto attached, I, W. W. Healey, a Notary Public in and for said city and county of San Francisco, aforesaid, residing therein, duly commissioned and sworn, did this day, in reasonable business hours, present said draft at the office of the Pacific Coast Casualty Company, Merchants Exchange Building, California Street in the city and county of San Francisco, State of California where said draft was made payable, and demand payment thereof, but the representative of said Pacific Coast Casualty Company, stated that the said draft was unauthorized, and that they would not pay said draft, therefore payment of said draft, drawn by General Bonding & Casualty Insurance Company, by J. B. Stephenson, President, maker of said draft, was refused.

WHEREUPON, I the said notary, at the request aforesaid did PROTEST, and by these presents do publicly and solemnly PROTEST, as well against the drawer or maker and endorsers of the said draft as



against all others whom it does or may concern, for all exchange or re-exchange, damages, costs, charges and interests, suffered or to be suffered, for want of payment of the said draft.

Thus done and protested, in the city and county of San Francisco on the day and year aforesaid.

In Testimony Whereof, I grant these presents under my signature, and the impress of my Seal of office, in the city and county of San Francisco on the day and year first above written.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

I, the undersigned notary, do hereby certify that the parties to the draft which is hereto attached, have been duly notified of the protest thereof, by letters to them by me written and addressed, dated on the day of the said protest, and served on them respectively in the manner following, viz,: upon General Bonding & Casualty Insurance Company by J. B. Stephenson, President Dallas, Texas, maker of said draft, and upon Locke & Locke, Dallas, Texas, endorsers of said draft, such being the reputed places of residence or address of said respective parties and the post-offices nearest thereto, according to the best information I could obtain, all of said letters being properly folded, inclosed in envelopes, sealed and addressed as above stated, and deposited in the United States Postoffice at San Francisco, California, postage prepaid thereon.

IN FAITH WHEREOF, I have hereunto signed

my [31] name and affixed my official seal this 28th day of November, 1913.

[Seal] W. W. HEALEY,  
Notary Public in and for the City and County of San Francisco, State of California." [32]

[Endorsed on back of protest]: "No. 2185. \$5,560.90, Protest Nonpayment of draft. By General Bonding & Casualty Insurance Company. By J. B. Stephenson, President, Dallas, Texas. Upon Pacific Coast Casualty Company, San Francisco, Cal. Favor of Locke & Locke, Dallas, Texas. Order. The Crocker National Bank of San Francisco." [33]

**Exhibit "M" [to Complaint—Statute].**

Revised Civil Statutes of the State of Texas, of 1911.

Article 4977. "Six per cent the legal rate.—On all written contracts ascertaining the sum payable, when no specified rate of interest is agreed upon by the parties to the contract, interest shall be allowed at the rate of six per cent per annum from and after the time when the sum is due and payable."

[Endorsed]: Filed Dec. 27, 1913. Walter B. Mal-  
ing, Clerk. [34]

**Summons.****UNITED STATES OF AMERICA.***District Court of the United States, Northern District of California, Second Division.***GENERAL BONDING & CASUALTY INSURANCE COMPANY,**

Plaintiff,

vs.

**PACIFIC COAST CASUALTY COMPANY,**

Defendant.

Action brought in said District Court, and the complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

**R. S. GRAY,  
LOCKE & LOCKE,**  
Plaintiff's Attorneys.

The President of the United States of America,  
Greeting: To Pacific Coast Casualty Company,  
Defendant.

You are hereby directed to appear, and answer the complaint in an action entitled as above brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded

in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 27th day of December in the year of our Lord one thousand nine hundred and thirteen and of our independence the one hundred and thirty-eight.

[Seal]

WALTER B. MALING,

Clerk. [35]

United States Marshal's Office,

Northern District of California.

I hereby certify, that I received the within writ on the 29th day of Dec., 1913, and personally served the same on the 29th day of December, 1913, upon Pacific Coast Casualty Co. by delivering to, and leaving with Fred B. Lloyd, who is the General Manager of the Pacific Coast Casualty Co. Said defendant named therein personally at the city and county of San Francisco in said District a certified copy thereof, together with a copy of the complaint, certified to by —, attached thereto.

San Francisco, December 29th, 1913.

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,

Office Deputy.

[Endorsed]: Filed Jan. 3, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [36]



*In the District Court of the United States, Northern  
District of California, Second Division.*

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Demurrer.**

Now comes the defendant above named and demurs to complaint of plaintiff on file in the above-entitled action, and for cause of demurrer specifies:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the above-entitled Honorable Court has no jurisdiction over the person of this defendant.

III.

That the above-entitled Honorable Court has no jurisdiction over the subject matter of the action as designated by plaintiff's complaint.

IV.

That several causes of action have been improperly united.

V.

That several causes of action have been improperly stated.

VI.

That this action is barred by the provisions of subdivision [37] L of the policy set forth by plaintiff in his complaint and marked exhibit "A."

VII.

That said complaint is uncertain in that it cannot be ascertained therefrom—

(a) Whether or not plaintiff is, or was at the time of the commencement of this action, licensed to do business in the State of California.

(b) Whether or not plaintiff is, or was at the time of the commencement of this action, engaged in doing business in the State of California.

(c) What if any knowledge plaintiff has that the Elmo Rock Company duly performed the conditions of its contract with the Pacific Coast Casualty Company.

(d) What if any knowledge plaintiff has that defendant was duly notified by the Elmo Rock Company of the occurrence of the accident mentioned by plaintiff in its complaint.

(e) How or in what manner or particular did John Davis, mentioned by plaintiff in its complaint, become the agent of defendant as alleged by plaintiff in its complaint.

(f) When, if at all, did this defendant engage Messrs. Meador and Davis as attorneys at law.

(g) When, if at all, did this defendant authorize John Davis to execute a contract of indemnity.

(h) When, if at all, this defendant held out John Davis to plaintiff as having authority to deal with it

in the usual course of business, as set forth by plaintiff in its complaint.

(i) What if any loss or expense the Elmo Rock Company suffered by reason of the action of J. B. Sowders against the [38] Elmo Rock Company, mentioned by plaintiff in its complaint.

### VIII.

That said complaint is ambiguous in each and every manner and particular in which it is alleged to be uncertain.

### IX.

That said complaint is unintelligible in each and every manner and particular in which it is alleged to be uncertain.

WHEREFORE, defendant prays that it be hence dismissed together with its cost of suit.

HAMILTON A. BAUER,

Attorney for Defendant.

The undersigned hereby certifies that the foregoing demurrer is well founded in law and not interposed for delay.

HAMILTON A. BAUER,

Attorney for Defendant.

[Endorsed]: Filed Jan. 5, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

*In the District Court of the United States for the  
Northern District of California, Sitting at San  
Francisco.*

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Amended Demurrer.**

Comes now the defendant above named and demurs to the complaint of plaintiff on file herein, and for grounds of demurrer states:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the above-entitled Honorable Court has no jurisdiction over the person of this defendant.

III.

That the above-entitled Honorable Court has no jurisdiction over the subject matter of the action as designated by plaintiff's complaint.

IV.

That several causes of action have been united in said complaint and have not been separately stated, to wit, an alleged cause of action upon an indemnity agreement set forth as exhibit "D," attached to said



complaint, with an alleged cause of action founded upon an insurance policy and an assignment thereof set forth as exhibits "A" and "J," attached to said complaint. [40]

#### V.

That several causes of action have been united in said complaint and have not been separately stated, to wit, an alleged cause of action by plaintiff as surety subrogated to the rights of the Elmo Rock Company, a corporation, and alleged cause of action on an agreement of indemnity alleged to have been executed by this defendant and above referred to, and an alleged cause of action as assignee of a policy issued by defendant to Elmo Rock Company.

#### VI.

That several causes of action have been improperly united, to wit, an alleged cause of action by plaintiff as surety subrogated to the rights of the Elmo Rock Company, a corporation, an alleged cause of action on an agreement of indemnity alleged to have been executed by this defendant and above referred to, and an alleged cause of action as assignee of a policy issued by defendant to Elmo Rock Company.

#### VII.

That the above-entitled action is barred by the provisions of subdivision "L" of the policy set forth by plaintiff in his complaint, and marked exhibit "A."

#### VIII.

That said complaint is uncertain in each and every of the following particulars:

a. That it cannot be ascertained therefrom whether the Elmo Rock Company sustained any loss

or expense from claims arising under the policy of Employers Liability Insurance referred to in said complaint, and marked exhibit "A."

b. That it cannot be ascertained therefrom whether [41] said Elmo Rock Company paid the judgment recovered in the Sowders case therein referred to.

c. That it cannot be ascertained therefrom whether this defendant defended said action brought by J. B. Sowders.

d. That it cannot be ascertained therefrom what terms insurance policy are referred to in lines 25 to 27, page 4, of said complaint.

e. That it cannot be ascertained therefrom whether this defendant authorized John Davis to sign the contract of indemnity, a copy of which is attached to said complaint, and marked exhibit "D."

f. That it cannot be ascertained therefrom in what manner this defendant held out John Davis to the plaintiff, as having authority to sign said contract of indemnity.

g. That it cannot be ascertained therefrom whether John Davis had any authority to represent this defendant other than as attorney and counselor at law.

h. That it cannot be ascertained therefrom in what respect said John Davis apparently possessed authority to affix the name of said defendant to said contract of indemnity.

i. That it cannot be ascertained therefrom whether this defendant did ever, by word or conduct hold out said John Davis as having authority in the

matter of obtaining bonds for this defendant.

j. That it cannot be ascertained therefrom in what respect this defendant ratified the said act of John Davis.

k. That it cannot be ascertained therefrom when the judgment in the case of Sowders against said Elmo Rock Company became final. [42]

l. That it cannot be ascertained therefrom whether the execution of said last-named action was ever levied upon any property of said Elmo Rock Company.

m. That it cannot be ascertained therefrom whether said John Davis was originally authorized to sign said contract of indemnity or whether said contract was signed without authority or subsequently ratified by this defendant.

n. That it cannot be ascertained therefrom when this defendant ratified the execution of said contract of indemnity.

o. That it cannot be ascertained therefrom what benefits, if any, were accepted by this defendant or received by this defendant as a result of the execution of said contract of indemnity.

p. That it cannot be ascertained therefrom under what *orders the* District Court of Kaufman County; Texas, the sheriff turned over the property levied upon by him to the receiver mentioned in said complaint.

q. That it cannot be ascertained therefrom what was the character of the proceedings referred to on page 9 of said complaint in which said W. D. Fletcher was appointed receiver.

r. That it cannot be ascertained therefrom whether the Elmo Rock Company was insolvent at the time of the appointment of the receiver as alleged in said complaint.

s. That it cannot be ascertained therefrom what, if any, authority the District Court of Kaufman County, Texas, possessed or had to authorize the assignment and delivery to plaintiff of the insurance policy referred to in said complaint.

IX.

Now that said complaint is unintelligible for each and all of the reasons set forth in paragraph eight, hereof. [43]

X.

That said complaint is ambiguous for each and all of the reasons set forth in paragraph eight hereof.

Therefore this defendant prays that plaintiff take nothing by its said complaint on file herein, and that this defendant may be dismissed hence with costs.

MYRICK & DEERING,  
Attorneys for Defendant.

JAMES WALTER SCOTT,  
Of Counsel.

I hereby certify that the foregoing demurrer is not interposed for the sake of delay and is in my opinion well taken in point of law.

JAMES WALTER SCOTT,  
Of Counsel.

Service of the within amended demurred admitted (on the understanding that defts. points and author-



ities will be served to-morrow) this 14th day of January, 1914.

R. C. GRAY,  
LOCKE & LOCKE,  
Attys. for Plff.

[Endorsed]: Filed Jan. 17, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

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At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 18th day of February, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable FRANK S. DIETRICH, District Judge for the District of Idaho, designated to hold and holding this Court.

No. 15,723.

GENERAL BONDING & CASUALTY CO.,

vs.

PACIFIC COAST CASUALTY CO.,

**Order Overruling Amended Demurrer in Part and  
Sustaining Amended Demurrer in Part.**

Defendant's amended demurrer to the complaint, heretofore heard and submitted being now fully considered and the Court having filed its memorandum decision thereon, it was ordered that said amended demurrer be and the same is hereby overruled in

part and sustained in part, with leave to amend within five days in accordance with said decision. [45]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

**Answer to Complaint.**

Comes now the above-named defendant, Pacific Coast Casualty Company, a Corporation, and answers the complaint of plaintiff on file herein as follows:

Defendant denies that said Elmo Rock Company duly, or at all, performed all or any of the conditions of said contract of insurance upon its part to be performed, both generally and specially with relation to the particular liability mentioned in said complaint, or either generally or specially with relation to the particular liability in said complaint mentioned, and defendant denies that said Elmo Rock Company become or was entitled to all or any of the benefits of said contract of insurance with reference to the particular liability mentioned in said complaint.

Defendant has not sufficient information or belief

upon the subject to enable it to answer the allegations contained in paragraph 2, subdivision 1, thereof, and placing its denial upon said ground this defendant denies that during the period of said policy one, J. B. Sowders, accidentally, or at all, suffered bodily injuries by reason of the prosecution of the work of quarrying and crushing rock, or quarrying or crushing rock, by said Elmo Rock Company, and by himself as employee, or [46] by said company or by himself as an employee, and denies that he was an employee of said Elmo Rock Company.

Defendant has no information or belief upon the subject matter of the allegations contained in paragraph 2, subdivision 2, of said complaint, and placing its denial upon said ground defendant denies that by a law of the State of Texas in force in the year 1912, or by any law of the State of Texas, it was made the duty of the clerk of the court to issue an execution upon the judgment referred to on page 3 of said complaint, or upon any judgment, upon application of the successful party in the action referred to on said page 3, after the expiration of twenty days from the rendition of said judgment, or at any other time, or at all, or after the overruling of said motion for new trial referred to in said complaint, unless a supersedeas bond on appeal or writ of error should have been theretofore filed and approved, or filed or approved.

Defendant denies that under the compulsion of the laws referred to on page 4 of said complaint, or any laws, or under the compulsion of its obligations to said Elmo Rock Company under the terms

of the policy referred to in said complaint, or under any compulsion whatsoever, or at all, this defendant took steps to suspend the execution of said judgment referred to in said complaint pending the appeal therein referred to, and denies that this defendant took steps to suspend the execution of the judgment therein referred to pending the appeal referred to in said complaint, and this defendant denies that it took steps to suspend the execution of said judgment either in the name of said Elmo Rock Company, or in any other name, or at all; and this defendant denies that through its attorneys at law, Messrs. [47] Meador & Davis, or through John Davis, or through any other person or persons, or at all, it took steps, or any steps, to suspend the execution of the judgment referred to in said complaint, and defendant denies that John Davis was authorized to apply to plaintiff to execute the supersedeas bond on appeal in said action, and denies that John Davis was authorized by defendant to induce the plaintiff to execute such bond, and denies that through said John Davis, or through any other person, or at all, defendant made and delivered, or made or delivered, to plaintiff, a contract of indemnity, a copy of which is exhibit "D," or any other contract of indemnity whatsoever, or at all; defendant denies that it executed said contract of indemnity, and denies that it authorized any other person or persons to execute said contract of indemnity, and denies that it agreed and bound itself, or agreed *and* bound itself, to indemnify the plaintiff, or keep it indem-



nified, as alleged in said complaint, or in any other manner, or at all; and defendant denies that it accepted the benefits of the alleged act of said John Davis and ratified the same, or ratified the same; and defendant denies that it had, at the time of said acts, or at any of the times alleged in said complaint, knowledge of the acts of said John Davis, and defendant denies that it held out the said John Davis to the plaintiff, or any other person, or at all, as having authority to deal with plaintiff in the usual course of business, or in any other manner, or at all, with reference to the matter of obtaining from it the execution of such supersedeas appeal bond, and indemnifying plaintiff against loss thereby incurred; and defendant denies that it at any time, or at all, held out said John Davis to plaintiff, or to any other person, or at all, as having authority to deal with plaintiff in the usual or any course of business, or at all, with reference [48] to the matter of obtaining from plaintiff the execution of such or any bond, or indemnifying plaintiff against loss thereby incurred; and this defendant is informed and believes, and placing its denial upon such information and belief denies that plaintiff without notice of defect in the authority of said John Davis dealt with him either in the usual course of business, or in any other way, or at all, and denies that it executed said bond in reliance upon any authority which he apparently possessed, and denies that he apparently possessed any authority in the premises; and placing its allegations upon said information and belief this defendant alleges that

said plaintiff dealt with said John Davis with full notice and knowledge of the fact that said John Davis did not have any authority to obtain said supersedeas bond from plaintiff, or to enter into any transactions on behalf of defendant with plaintiff relating to said supersedeas appeal bond, or relating to any other matter at all, and that said plaintiff had express written notice of the fact that said John Davis did not have such authority, and said plaintiff had said express written notice prior to the execution by plaintiff of said supersedeas bond, and prior to the making of said alleged contract of indemnity.

And this defendant has not sufficient information or belief upon the subject to enable it to answer the remaining allegations of subdivision 3, paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that it has paid plaintiff the premium charged by plaintiff for the making of such bond, or that said premium has been paid on behalf of this defendant, or that the same has been paid with the authority from this defendant. [49]

This defendant has not information or belief upon the subject sufficient to enable it to answer the allegations contained in subdivision 4, paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that in consideration of any premium paid to plaintiff by or on behalf of defendant, or in consideration of the execution or delivery of the contract of indemnity referred to in said complaint, plaintiff executed and deliv-

ered, or executed or delivered to defendant's said attorneys at law a supersedeas bond in the action referred to in said complaint, and placing its denial upon the same ground defendant denies that it procured Elmo Rock Company to sign said bond, and denies that said Elmo Rock Company signed said bond as principal, or otherwise, and denies that said bond was duly or at all approved by the clerk of the court, and filed among the papers in said action, or approved by the clerk of the court, or filed among the papers in said action, and denies that exhibit "H" is a copy of said bond, or that the approval or file marks of the clerk of said court appear, or that a copy of them appears, on said exhibit "E."

Defendant has not information or belief upon the subject sufficient to enable it to answer the allegations contained in subdivision 5, paragraph 2, of said complaint, and placing its denial upon said ground defendant denies that the judgment therein referred to was affirmed by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on March 15, 1913; and denies that on May 28, 1913, the Supreme Court of Texas, denied a writ of error; and denies that on June 27, 1913, the Supreme Court of Texas overruled a motion for the rehearing of said application for writ of error; and denies that Exhibit "F" is a copy [50] of the judgment of the Supreme Court of Texas, or any judgment of said Supreme Court; and denies that a copy of said judgment of the Supreme Court of Texas was filed on July 5, 1913, in the office of the clerk of said Court of Civil Appeals; and denies



that said Court of Civil Appeals on August 12, 1913, issued a mandate to the District Court of Kaufman County commanding it to observe the order of said Court of Civil Appeals; and denies that said or any order was in the nature of a judgment of affirmance of the judgment of said District Court referred to in said complaint; and denies that the order was in the nature of a judgment of affirmance of said or any judgment or contained an additional judgment that the appellee, J. B. Sowders, have and recover, or have or recover, from appellant, Elmo Rock Company, and from plaintiff, or from plaintiff, as its surety, or otherwise, the amount adjudged below, and all costs, or the amount adjudged below or all costs; and denies that said or any mandate was duly or at all filed in the office of the clerk of the District Court of Kaufman County, Texas, on August 18, 1913, or at any other time, or at all; and denies that then for the first time the judgment in favor of Sowders, and against Elmo Rock Company, became final in the sense referred to in said complaint, or in any sense whatsoever, or at all; and denies that exhibit "G" is a copy of said or any mandate, and of the file marks of the clerk, or of the file marks of the clerk of the said District Court.

This defendant has not information or belief upon the subject sufficient to enable it to answer the allegations contained in subdivision 6, of paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that on August 19, 1913, or at any other time, or at all, a writ of execution was duly or at all issued out of said Dis-



trict Court of [51] Kaufman County, Texas, for the collection of the judgment, and interest and costs referred to in said complaint, or for the collection of the judgment, interest or costs therein referred to; and denies that on September 5, 1913, the sheriff of Kaufman County, Texas, duly, or at all, levied said execution upon a large amount of real and personal property as the property of said Elmo Rock Company, or upon a large or any amount of real or personal property, as the property of said Elmo Rock Company, or upon any property whatsoever, or at all; and denies that said sheriff advertised property, or any property, for sale at the time and place referred to in said complaint, or at any other time or place whatsoever; and denies that thereafter, or at all, the sheriff, either with or without having sold the same, turned said or any property over to W. D. Fletcher, as receiver for said Elmo Rock Company; and denies that said act, or any act, was done by said sheriff under orders of the District Court of Kaufman County, Texas; and denies that said sheriff made return of the writ of execution either as mentioned in said complaint, or at all; and denies that thereafter, or at all, an alias writ of execution was duly or at all issued out of the District Court of Kaufman County commanding the sheriff of Dallas County to make the amount of said judgment, and interest, and costs, or commanding the said sheriff to make the amount of said judgment, or interest, or costs, out of the property of this plaintiff.

Defendant has no information or belief upon the

subject sufficient to enable it to answer the allegations contained in subdivision 7, paragraph 2, of said complaint, and placing its denial upon said ground this defendant denies that within ninety, or any, days from the date of the filing of mandate in said action [52] in the District Court of Kaufman County, or at any other time, or at all, plaintiff paid to the owners of said judgment the sum of Five Thousand Four Hundred and 50/100ths (\$5,400.50) of said alias writ of execution issued against and denies that said or any payment was made by plaintiff at the instance and request, or at the instance or request, of Elmo Rock Company acting through its receiver, W. D. Fletcher, or at all; and denies that said or any payment was made at said or any other time on behalf of said Elmo Rock Company; and denies that said or any payment was made under compulsion of the judgment rendered against plaintiff in said action, or under the compulsion of said judgment, or any sum of money whatsoever, or at all; and denies that plaintiff paid to the officers of court the taxed costs in said action in the sum of One Hundred and Sixty and 40/100ths (\$160.40) Dollars, or in any sum of money whatsoever, or at all; and denies that plaintiff paid the sum of Five Thousand Five Hundred and Sixty and 90/100ths (\$5,560.90) Dollars in full settlement, or any settlement, and discharge, or in full or any settlement or discharge, of said or any judgment, and interest and costs, or said or any judgment, or interest, or costs.

And this defendant has no information or belief upon the subject sufficient to enable it to answer

the allegations contained in paragraph 3 of said complaint, and placing its denial upon said ground this defendant denies that on September 17, 1913, or at any other time, or at all, the District Court of Kaufman County, Texas, in the cause referred to in said paragraph of said complaint, gave an order appointing W. D. Fletcher, Receiver of said Elmo Rock Company, and directed that upon his taking the oath required by law, and filing a sufficient bond in [53] the sum of Twenty-five Hundred (\$2500) Dollars, he take possession of all or any the assets and properties of said Elmo Rock Company, and hold the same subject to the further order of said Court: and denies that on September 17, 1913, said Court in said cause duly, or at all, gave an order appointing said Fletcher, receiver of said company, or directing that upon his taking said oath, or filing said bond, he take possession of all the assets or properties of said company, or hold the same subject to the further order of said Court: and denies that said W. D. Fletcher took oath, or filed said bond, on September 20, 1913; and denies that exhibit "H" is a copy of said or any order of said Court; and placing its denial upon said ground this defendant denies that thereafter, or on October 31, 1913, or at all, in said receivership suit mentioned in said paragraph, or in any other action, or at all, said District Court of Kaufman County gave an order authorizing said receiver to assign and deliver, or assign or deliver, to plaintiff the policy of employer's liability insurance referred to in said complaint; and denies that exhibit "I" is a copy of



said or any order of said Court: and placing its denial upon said ground defendant denies that on November 4, 1913, in pursuance of and by authority of the order of the Court referred to in said paragraph, or in pursuance of or by authority of the order of any Court whatsoever, or at all, and in consideration of the payment therein alleged to have been made by plaintiff, or in consideration of any payment made by plaintiff, or for any consideration whatsoever, or at all, said W. D. Fletcher, as Receiver for said Elmo Rock Company, assigned and transferred, or assigned or transferred to plaintiff the said policy of employer's liability insurance; and denies that plaintiff is now the owner and holder, or owner or holder, of said policy, and of all or any of the rights of said Elmo Rock Company thereunder, or [54] of all or any the rights of said Elmo Rock Company thereunder, and denies that exhibit "J" is a copy of said assignment referred to in said complaint, or a copy of any assignment whatsoever.

Defendant denies that the contract of indemnity referred to in said complaint was made in the State of Texas, or at all.

And for a further and separate defense to said cause of action in said complaint contained this defendant alleges that the payment of the judgment against the Elmo Rock Company, referred to in said complaint, and of the judgment against plaintiff herein in said complaint referred to, was made by plaintiff as a volunteer, and not otherwise.

And for a further and separate defense to the cause



of action set forth in plaintiff's complaint herein this defendant alleges that said cause of action is barred by the provisions of the policy of insurance issued by this defendant, a copy of which is attached to said complaint, and marked exhibit "A," to which reference is hereby expressly made, and which is by said reference made a part hereof, and especially by the provisions of paragraph L of said policy of insurance.

And for a further and separate defense to said cause of action set forth in said complaint this defendant alleges that in and by the policy of insurance above referred to, this defendant insured the Elmo Rock Company, of the county of Kaufman, State of Texas, against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered, or alleged to have been suffered, during the period of said policy, by any employee of the assured, subject to the terms and conditions and limitations in said policy contained, and more particularly set forth therein, and this defendant alleges that [55] the said assured has never, as plaintiff is informed and believes suffered any loss and expense, or loss or expense from such claim or claims, and alleges that no liability on the part of this defendant has ever attached under said policy.

WHEREFORE this defendant prays that plaintiff take nothing by its said complaint, and that this defendant be dismissed hence with costs of suit; and for such other and further relief as to this Honorable

Court may seem meet and proper in the premises.

MYRICK & DEERING,  
Attorneys for Defendant.  
JAMES WALTER SCOTT,  
Of Counsel.

State of California,  
City and County of San Francisco,—ss.

J. M. Hoyt, being duly sworn, deposes and says: That he is the assistant secretary of Pacific Coast Casualty Company, defendant in the above-entitled action; that he has read the foregoing answer to complaint, and knows the contents thereof, that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

J. M. HOYT.

Subscribed and sworn to before me this 12th day of March, 1914.

[Seal] M. I. LAWRENCE,  
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires January 27, 1918. [56]

Due service of the within answer to complaint, and receipt of a copy, is hereby admitted this 12th day of March, 1914.

LOCKE & LOCKE and  
R. S. GRAY,  
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 12, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

**[Stipulation Waiving Jury.]**

*In the District Court of the United States, Northern  
District of California.*

GENERAL BONDING & CAS. CO.

vs.

PACIFIC COAST CASUALTY CO.

It is hereby stipulated that a jury is waived herein.

MYRICK & DEERING,

JAMES WALTER SCOTT,

Attorneys for Defdt.

LOCKE & LOCKE,

R. S. GRAY,

Attys. for Plff.

[Endorsed]: Filed Sept. 11, 1914. Walter B. Mal-  
ing, Clerk. [58]

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At a stated term, to wit, the March term, A. D. 1915,  
of the District Court of the United States of  
America, in and for the Northern District of  
California, Second Division, held in the court-  
room in the City and County of San Francisco,  
on Monday, the 15th day of March, in the year  
of our Lord one thousand nine hundred and  
fifteen. Present: The Honorable WILLIAM C.  
VAN FLEET, District Judge.

No. 15,723.

GENERAL BONDING & CASUALTY INS. CO.

vs.

PACIFIC COAST CASUALTY CO.

**Order Denying Defendant's Motion for a Nonsuit,  
etc.**

Defendant's motion for a nonsuit and this cause; heretofore heard and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that said motion for nonsuit be and the same is hereby denied and that judgment be entered in favor of plaintiff and against defendant in the sum of \$6,160.43 and for costs. [59]

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**[Notice of Motion for Order Directing that Findings  
be Prepared.]**

*In the District Court of the United States, for the  
Northern District of California, Second Division.*

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

To the above-named Plaintiff, and to R. S. Gray, Esq., and Messrs. Locke & Locke, Its Attorneys:

You are and each of you is hereby notified that on Monday, the 22d day of March, 1915, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel may be heard in the courtroom of the above-entitled court, Division No. 2, thereof, in the



Postoffice building, on Seventh Street, near Market Street, in the City and County of San Francisco, State of California, the above-named defendant will move the above-entitled Honorable Court to give and make an order directing that Findings be prepared in the above-entitled cause;

Said motion will be made upon the ground that the making of such findings will facilitate the presentation of the case to the above-entitled court on motion for new trial, and also on appeal if an appeal be taken herein.

Said motion will be based upon this notice of motion, the affidavit of James Walter Scott, a copy of which is served [60] herewith, and upon the records, papers, pleadings and files in the above-entitled action.

Very respectfully yours,  
MYRICK & DEERING,  
JAMES WALTER SCOTT,  
Attorneys for Defendant.

[Endorsed]: Filed Mar. 18, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [61]

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At a stated term, to wit, the March term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held in the courtroom in the City and County of San Francisco, on Monday, the 29th day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,723.

GENERAL BONDING & CASUALTY INS. CO.

VS.

PACIFIC COAST CASUALTY CO.

**Order Granting Defendant's Motion for Order for  
Special Finding, etc.**

By consent of plaintiff it was ordered that defendant's motion for order for special findings be granted and that the entry of judgment be continued and judgment entered on the findings. [62]

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*In the District Court of the United States, for the  
Northern District of California, Second Division.*

No. 15,723—AT LAW.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

VS.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

**Findings of Fact.**

The above-styled cause was tried in September, 1914, before the Honorable WM. C. VAN FLEET, District Judge, without a jury, trial by jury having been waived by written stipulation signed by the attorneys for both parties, duly filed and presented in open court.

The cause was submitted September 15, 1914, upon

the evidence, with direction by the Court that written arguments be filed by both parties.

The Court does now make the following

### FINDINGS OF FACT.

#### 1.

1. The plaintiff, General Bonding & Casualty Insurance Company, is a Texas corporation domiciled at Dallas, Texas, and a citizen of Texas. The defendant, Pacific Coast Casualty Company, is a California corporation domiciled at San Francisco, California, and a citizen of California.

2. On all pertinent dates the defendant was lawfully engaged as an insurance company in issuing policies of employer's liability insurance in Texas, and the plaintiff was lawfully engaged as a surety company in making judicial bonds, and especially supersedeas appeal bonds, in Texas, and Elmo Rock [63] Company was a Texas corporation engaged in quarrying and crushing rock.

#### 2.

3. On June 18, 1911, the defendant for a premium duly paid issued to Elmo Rock Company its policy of employer's liability insurance No. M. E. 36,696, whereof the portions relevant to this litigation read as follows:

“IN CONSIDERATION of the warranties herein and of Eighty-four and 00/100 Dollars (\$84.00) estimated premium, the PACIFIC COAST CASUALTY COMPANY, of San Francisco, California, hereinafter called the Company,

Hereby Insures

**THE ELMO ROCK COMPANY**

of the County of Kaufman, State of Texas, hereinafter called the Assured,

AGAINST LOSS AND EXPENSE ARISING FROM CLAIMS UPON THE ASSURED FOR DAMAGES ON ACCOUNT OF BODILY INJURIES ACCIDENTALLY SUFFERED OR ALLEGED TO HAVE BEEN SUFFERED DURING THE PERIOD OF THIS POLICY BY ANY EMPLOYEE OF THE ASSURED by reason of the prosecution of the work described herein.

THIS INSURANCE IS SUBJECT TO THE FOLLOWING CONDITIONS:

Limits. A. The Company's liability on account of an accident to one person is limited to FIVE THOUSAND and 00/100 Dollars (\$5,000); and, subject to the same limit for each person, the Company's total liability for an accident to more than one person is limited to TEN THOUSAND and 00/100 Dollars (\$10,000).

Reporting Accidents. B. Upon the occurrence of an accident the Assured shall give to the Company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable, and the Company, at its own expense, will make such investigation as it may deem necessary.

Reporting Claims. If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same..



**Reporting Suits.** If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent, every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company.

**Co-operation of Assured.** C. The Assured shall render to the Company at all times all co-operation and assistance in his power."

"3. The business or occupations to be insured; the specific location where work is to be done; the [64] estimated compensation of the employees in each business or occupation; and the premium rate to be paid thereon are as follows:

Business or Occupation.	Specific Location Where Work is to be Done.	Estimated Compensation.	Premium Rate.	Amount of Estimated Premium.
Quarrying and crushing rock.	Elmo, Texas	\$4,200	2%	\$84.00"

"4. This policy covers, and the compensation specified above includes the compensation of drivers, drivers' helpers, collectors and messengers at or away from the locations above specified, cooks, helpers, common laborers, engineers, clerks, superintendents, officers (if a corporation) and all employed in connection with the above business or occupation, in any

manner whatsoever, excepting: Officers.”

“Right of Recovery. L. No action shall lie against the Company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue.

Policy Period. M. The period of this policy shall be from the Eighteenth day of June, 1911, at noon, to the Eighteenth day of June, 1912, at noon, standard time, at the place where this policy is executed.

IN WITNESS WHEREOF, the PACIFIC COAST CASUALTY COMPANY has caused this Policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

E. F. GREEN,  
President.

F. A. ZANE,  
Secretary.

Countersigned at Dallas, Texas, this 18th day of June, 1911.

MILLER-STEMMONS CO.,  
General Agent.”

4. Said policy was issued through the defendant's agents at Dallas, Texas, Miller-Stemmons Company, a firm of which W. L. Leeds was the managing partner. Miller-Stemmons Company were acting under J. F. Seinsheimer & Company, of Galveston, Texas, the defendant's general agents.

5. During the term of said policy J. B. Sowders,

an adult employee of Elmo Rock Company, accidentally suffered bodily injuries by reason of the prosecution of the work of quarrying and crushing rock at Elmo, Texas, by said Elmo Rock Company, and by himself as its employee. For the recovery of damages for such injuries he sued Elmo Rock Company in the District Court of Kaufman County, Texas. [65]

6. Having been duly notified by Elmo Rock Company of the occurrence of such accident and the institution of such action the defendant undertook to defend the action, and took upon itself the entire management and control thereof to the exclusion of Elmo Rock Company, all in accordance with the provisions of said policy. The defendant conducted its defense of said action through John Davis of the firm of Meador & Davis, attorneys at law at Dallas, whom it habitually employed in litigation in the vicinity of Dallas. The litigation was managed by Davis, as attorney of record for Elmo Rock Company under the employment of the defendant herein.

7. On June 19, 1912, J. B. Sowders recovered judgment against Elmo Rock Company for five thousand dollars and costs with interest at six per cent, from the date of the judgment. On July 19, 1912, the motion of Elmo Rock Company for a new trial was overruled. By a law of the State of Texas then in force it was made the duty of the clerk of the court to issue an execution upon said judgment upon the application of the successful party thereto after the expiration of twenty days from the rendition of the judgment, and after the overruling of the motion

for new trial, unless a supersedeas bond on appeal or writ of error should have been theretofore filed and approved. By other laws of the state of Texas then in force Elmo Rock Company was entitled to suspend the execution of said judgment pending its appeal therefrom, by giving a supersedeas appeal bond in a sum at least double the amount of the judgment, interest and costs, conditioned that the appellant should prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals should be against it, it should perform such judgment, sentence or [66] decree and pay all such damages as said Court might award against it, and such supersedeas appeal bond might be made by the plaintiff herein as a surety company.

8. On August 7, 1812, a supersedeas appeal bond executed and conditioned as required by the Texas law was filed in said action, the principal in said bond being Elmo Rock Company and the surety the plaintiff herein. Thereby the execution of the judgment in said action was suspended pending the appeal.

9. Correct copies of the policy of employer's liability insurance, the judgment in *Sowders v. Elmo Rock Company*, the relevant Texas statutes and the supersedeas appeal bond above mentioned are attached to the complaint as exhibits "A," "B," "C," and "E," respectively.

3.

10. Upon the rendition of the judgment in *Sowders v. Elmo Rock Company*, Davis notified the de-



fendant herein thereof, and was instructed by letter dated June 28, 1912, as follows: "Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedeas bond staying execution.

Thereupon Davis requested Elmo Rock Company to furnish a supersedeas appeal bond, but it refused to do so upon the ground that the defendant herein should do this. Davis wrote again urging that the rock company furnish the bond. A copy of this correspondence having been forwarded to the defendant herein, it wrote to Davis July 30, 1912, saying: "We endorse your action taken in this matter and will ask you to proceed with the appeal, but the assured must furnish its own supersedeas bond."

11. W. L. Leeds, managing partner of the defendant's agents Miller-Stemmons Company, called on the president of the plaintiff [67] herein, and the latter consented to make a supersedeas appeal bond in Sowders v. Elmo Rock Company, provided an indemnity bond were given it by the defendant herein. Miller-Stemmons Company procured an indemnity bond from the defendant through the attorneys Meador & Davis. They were authorized by J. F. Seinsheimer & Company to have the bond executed.

4.

12. Davis called on the president of the plaintiff company, and obtained from it the supersedeas appeal bond above mentioned, and as an inducement to the issuance thereof gave to it an indemnity contract reading as follows:

“The State of Texas,  
County of Dallas.

Whereas, heretofore, to wit, on the — day of ———, the Pacific Coast Casualty Company of San Francisco, California,. issued to the Elmo Rock Company of Terrell, Texas, as employer’s liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and,

Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of \$5,000.00 in the District Court of Kaufman County, Texas; and, whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas a supersedeas bond of \$11,000.00 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, [68] costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain, incur or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

Witness its hand, this 6th day of August, 1912.

PACIFIC COAST CASUALTY COMPANY.

By JOHN DAVIS,

Its Attorney at Law and in Fact.

13. Stephenson, who acted for the plaintiff company, was not shown the defendant company's letter of June 28, 1912, to its attorneys, and was not in any way made aware of any limitations upon the authority of Davis, and dealt with him in the supposition that his authority was that which was usual in such cases, and was apparently possessed by him.

14. Said Davis and Leeds knew of the transaction with Stephenson and of the giving of the indemnity contract.

4.

15. In due course the judgment of the District Court in Sowders v. Elmo Rock Company was affirmed by the Court of Civil Appeals, a motion for rehearing was overruled, a writ of error was refused by the Supreme Court, and a motion for rehearing of that matter was overruled and a mandate was

issued by the Court of Civil Appeals and filed with the District Court. The mandate was issued August 12, 1913, and filed in the District Court August 18, 1913. Under the Texas law the filing of the mandate was the final step in the litigation, and entitled Sowders to execution on his judgment. A true copy of the mandate is attached as exhibit "G" to the complaint. By the proceedings on appeal judgment was rendered not only against Elmo Rock Company, but against the plaintiff herein as its surety, for the amount of the judgment rendered in the District Court with interest and costs, and it was upon this judgment that under the Texas practice [69] execution was to issue from the District Court.

5.

16. On August 19, 1913, a writ of execution upon the judgment as finally rendered on appeal was issued out of the District Court, and on September 5, 1913, the sheriff of Kaufman County, Texas, levied the same upon a large amount of real and personal property of Elmo Rock Company, and advertised the property for sale October 7, 1913. at the courthouse of Kaufman County. Thereupon a stockholder of Elmo Rock Company obtained the appointment of a receiver for said company by the District Court of Kaufman County, Texas, and the sheriff turned over the property levied upon to the receiver of the company under orders of the District Court, and made return of his execution as unsatisfied without having sold the property. Thereupon an alias writ was issued out of the District Court of



Kaufman County, commanding the sheriff of Dallas County to make the amount of the judgment and interest and costs out of the property of the plaintiff herein.

17. Thereupon on October 22, 1913, under compulsion of the judgment rendered against it upon its supersedeas appeal bond, and at the special request of the receiver of Elmo Rock Company, the plaintiff herein paid to the owners of the judgment in Sowders v. Elmo Rock Company, the amount of the principal and interest due upon said judgment and paid to the officers of court the amount of costs accrued. The principal sum of the judgment was five thousand dollars, and accrued interest was four hundred dollars fifty cents, and the costs were one hundred sixty dollars forty cents. The aggregate sum paid by the plaintiff herein to discharge the judgment in Sowders v. Elmo Rock Company therefore [70] was five thousand five hundred sixty dollars ninety cents.

18. In consideration of its payment of the judgment in Sowders v. Elmo Rock Company the owners thereof assigned the same with all rights existing thereunder to the plaintiff, and the receiver of Elmo Rock Company under order of the District Court assigned to the plaintiff the employer's liability policy issued by the defendant.

19. The property of Elmo Rock Company levied upon by the sheriff and held by the receiver of 19 acres of land worth nineteen thousand dollars, and encumbered by a lien of three thousand five hundred dollars prior to the execution lien, and personal

property not including the employer's liability policy here in suit.

6.

20. On November 28, 1913, the plaintiff herein demanded from the defendant herein the payment of five thousand five hundred sixty dollars ninety cents in full settlement of its obligations under said policy of employer's liability insurance and said contract of indemnity. The defendant refused payment, and denied all liability, and thereupon this action was instituted.

21. The legal rate of interest in Texas applicable to such demands as that sued upon is six per cent.

**Conclusions of Law.**

As a conclusion of law from the foregoing facts the Court finds that the plaintiff is entitled to have and recover judgment against the defendant for the sum of six thousand, one hundred and sixty and 43/100 dollars (\$6,160.43), and costs of [71] suit. Let judgment be entered accordingly.

WM. C. VAN FLEET,

United States District Judge.

O. K.—JAMES WALTER SCOTT.

R. S. GRAY.

[Endorsed]: Filed Sept. 15, 1915. Walter B. Maling, Clerk. [72]

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 15,723.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

### **Judgment on Findings.**

This cause having come on regularly for trial on the 11th day of September, 1914, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein: R. S. Gray and Maurice E. Locke, Esqrs., appearing as attorneys for plaintiff and James Walter Scott, Esq., appearing as attorney for defendant; and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having filed its special findings in writing, and ordered that judgment be entered herein in accordance therewith;

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that General Bonding and Casualty Insurance Company, a corporation, plaintiff do have and recover of and from Pacific Coast Casualty Company,

a corporation, defendant, the sum of Six thousand one hundred sixty and 43/100 (\$6,160.43) Dollars, together with its costs herein expended taxed at \$90.00.

Judgment entered September 15, 1915.

WALTER B. MALING,  
Clerk.

A True Copy. Attest:

[Seal] WALTER B. MALING,  
Clerk. [73]

[Endorsed]: Filed Sept. 15, 1915. Walter B. Maling, Clerk. [74]

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*In the District Court of the United States, for the  
Northern District of California.*

No. 15,723.

GENERAL BONDING & CASUALTY INSUR-  
ANCE CO.

vs.

PACIFIC COAST CASUALTY COMPANY,

**Certificate of Clerk U. S. District Court to  
Judgment-roll.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.



ATTEST my hand and the seal of said District Court, this 15th day of September, 1915.

[Seal]

W. B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed September 15th, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

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*In the District Court of the United States, Northern  
District of California, Second Division.*

No. 15,723.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

R. S. GRAY and LOCKE & LOCKE, for Plain-  
tiff.

MYRICK & DEERING and HAMILTON A.  
BAUER, for Defendant.

**Memorandum Decision Upon Amended Demurrer to  
Complaint.**

DIETRICH, District Judge:

The amended demurrer is overruled in all respects, excepting in so far as it raises the objection of alternative or conditional averments on page five of the complaint, touching the authority of one John

Davis to bind the defendant, or perhaps more broadly touching the validity of the indemnity agreement executed by Davis for and on behalf of the defendant. Amendment in this respect may be made if the plaintiff so desires by interlineation or by filing an amendment, rather than by filing a complete amended complaint. Five days leave will be given for making the amendment.

[Endorsed]: Filed February 18, 1914. Walter B. Maling, Clerk. [76]

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*In the District Court of the United States, Northern  
District of California, Second Division.*

No. 15,723.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Memorandum Opinion.**

LOCKE & LOCKE, of Dallas, Texas, and R. S.

GRAY, of San Francisco, for Plaintiff.

MYRICK & DEERING, of San Francisco, for  
Defendant.

VAN FLEET, District Judge:

A further examination of the grounds advanced by defendant in support of its motion for nonsuit, upon which it rested its case, confirms the impression

made at the trial that they are without substantial merit.

(1) As to the question of the authority of defendant's attorney Davis to bind it by his indemnity agreement to plaintiff, I think, in the first place, as contended by plaintiff, that when defendant authorized Davis to take an appeal he was empowered to do all that was necessary to make that appeal effective, notwithstanding the limitation suggested in defendant's letter that the Elmo Rock Company should furnish the supersedeas bond; and the plaintiff, when applied to by Davis and the defendant's agent Leeds to furnish such bond had a right to assume their authority to represent defendant. Moreover, I think the facts fully sustain the claim that defendant, by paying the premium on the bond and accepting its benefit for the purpose for which it was issued, ratified the acts of its agents in the premises and cannot now [77] be heard to question them.

(2) There is nothing of substance in the claim that the policy sued on is not assignable. It is more than a policy of indemnity. It is one of insurance against loss, and when the liability of the defendant became fixed by a loss suffered, any reason for holding the policy nonassignable ceased and it was competent for the assured to assign to plaintiff, in consideration of the latter paying the judgment against it, the rights of the assured thereunder. In this respect the case is within the principles of *Maryland Casualty Company vs. Omaha Electric Light & Power Company*, 157 Fed. 514.

(3) The other grounds urged do not require special or separate notice; they are purely technical and not of substantive value.

The recovery should be for the amount paid in satisfaction of the judgment recovered by Sowders, including the interest and costs. The defendant's contract was to indemnify the insured for the principal amount and all costs and expenses of defending the action. The interest accruing on the judgment was a part of such expenses and was incurred through the delay arising from defendant's prosecuting the appeal. It could have been saved by payment of the judgment, and must therefore be regarded as incurred by defendant and for its protection. In my view it falls within the terms of the policy, which expressly covers costs and expenses in addition to the indemnity.

Plaintiff will have judgment accordingly.

[Endorsed]: Filed March 15, 1915. Walter B. Maling, Clerk. [78]

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*In the District Court of the United States, for the  
Northern District of California, Second Division.*

GENERAL BONDING & CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.



**Defendant's Bill of Exceptions.**

Now comes the defendant herein, Pacific Coast Casualty Company, a corporation, Messrs. Myrick & Deering and James Walter Scott, Esq., appearing as its attorneys, and presents this, its bill of exceptions, as follows:

This cause came on to be heard on the 12th day of September, 1914, before the Honorable William C. Van Fleet, Judge of the United States District Court for the Northern District of California, sitting at San Francisco, California, without a jury, a jury having been waived in writing by both parties, the plaintiff appearing by R. S. Gray, Esq., and Maurice E. Locke, Esq., its attorneys, and the defendant appearing by James Walter Scott, Esq., of counsel for defendant, All parties having announced themselves ready for trial the [79\*—1†] following proceedings were had and testimony given:

“Mr. SCOTT.—The defendant, if your Honor please, before the taking of the evidence begins, desires to move that the plaintiff be directed to elect between the three separate causes of action which, to our mind, are set up in the complaint, and to now state whether they are suing as assignee of the Elmo Rock Company by virtue of the assignment said to have been received by the receiver in a certain action in Texas, or whether they are proceeding on the theory that they, as surety, are subrogated to certain rights of the Elmo Rock Company. All three mat-

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\*Page-number appearing at foot of page of original certified Record.

†Original page-number of Defendant's Bill of Exceptions as same appears in Original Certified Transcript of Record.

ters are set forth in the complaint. We demurred.

“The COURT.—The demurrer was overruled, was it not?

“Mr. SCOTT.—Yes; we demurred on these same grounds.

“The COURT.—Your motion will be denied.

“Mr. SCOTT.—We wish to make the motion in aid of the demurrer so as to exercise our point, and we take an exception.

“The COURT.—Very well.”

#### DEFENDANT'S EXCEPTION NO. 1.

#### [Deposition of Angus G. Wynne, for Plaintiff.]

Thereupon Mr. Locke introduced in evidence and read the deposition of [80—2] ANGUS G. WYNNE, a witness called for the plaintiff, who testified as follows:

#### Direct Examination.

(By MAURICE E. LOCKE, Esq.)

The WITNESS.—My name is Angus G. Wynne; residence, Kaufman, Texas. I am a member of the firm of Wynne & Wynne, of Kaufman, Texas. That firm was engaged in the practice of law in 1911 and 1912 in Kaufman County, Texas. Their office was at Wills Point, Van Zandt County. It now maintains an office in each of the above-named places. In the case of J. B. Sowders vs. Elmo Rock Company, pending in the District Court of Kaufman County, and numbered 5774 on the docket of that court, we represented the plaintiff as his attorneys. That case was finally tried upon the first amended original petition of the plaintiff, filed June 5th, 1912, and

(Deposition of Angus G. Wynne.)

upon the first amended original answer of the defendant, Elmo Rock Company, filed June 5th, 1912. Meador & Davis, attorneys, were in active control of the litigation in behalf of the defendant Elmo Rock Company. Of that firm John Davis had direct charge of the litigation. My correspondence and negotiations regarding [81—3] the matters incidental to the progress of the litigation were had with John Davis. All letters that were received were either signed by John Davis, or Meador & Davis per John Davis, unless some letter was merely signed Meador & Davis. I don't remember whether John Davis was on every letter or not. The case was tried in the District Court of Kaufman County, and the plaintiff recovered a judgment against the defendant in the sum of Five Thousand Dollars, and it was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, and was there affirmed by said Court, the defendant applying to the Supreme Court of the State of Texas, or made application for a writ of error, which application was refused by the Supreme Court and the judgment of the lower courts affirmed.

“Q. What steps did you take after filing of the mandate for the collection of the judgment?”

“Mr. SCOTT.—We object to that as calling for secondary evidence and not the best evidence.

“The COURT.—The objection is overruled.”

DEFENDANT'S EXCEPTION NO. 2.

“A. I applied to the firm of Meador & Davis, at

(Deposition of Angus G. Wynne.)

Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days.

“Mr. SCOTT.—We move that the latter portion of the answer go out as hearsay.

“The COURT.—The motion is denied.”

DEFENDANT'S EXCEPTION NO. 3.

“Mr. YOUNG. (Of counsel for the defendant on the taking of the original deposition.) I object to that, and ask for the production of the letter. Have you got the letter? [82—4]

“A. I have got some of them. I don't remember the date of the personal application to Mr. Davis at his office at Dallas, but I wrote to them on July 11th, 1913.

“Q. Will you read your letter into the record?

“Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent.

“The COURT.—The objection is overruled.”

DEFENDANT'S EXCEPTION NO. 4.

“A. It is as follows: ‘Kaufman, Texas, July 11th 1913, Meador & Davis, Dallas, Texas. Dear Sirs: In re: Sowders vs. Elmo Rock Company. Our client is becoming very impatient about his money in the above case, and is punching us all the time. If you will rush the matter up we will appreciate it. Very truly, Wynne & Wynne, by Angus G. Wynne.’ To which John Davis replied on the bottom of the same sheet of paper: ‘Mr. Wynne: We are again to-day writing to our people to let the money come forward on this. What has become of the Elmo Rock Com-



(Deposition of Angus G. Wynne.)

pany business and property? Yours very truly, Meador & Davis, by John Davis.' I again took the matter up with Mr. Davis, I believe it was by telephone, and also called at his office, but as I remember now, did not get to see Mr. Davis personally, but I wrote to him at a later date and urged him to forward this money, to which he replied on July 21st, 1913.

"Q. Read that letter into the record.

"Mr. SCOTT.—We object to that on the ground that no proper foundation is shown. Mr. Davis is shown to be the attorney for the Elmo Rock Company. There is no proof that he is our attorney, or that he is authorized to bind us.

"The COURT.—So far as that is concerned, they may not be able to prove all the facts by one witness, but it is not at all [83—5] incompetent if they show that Davis was representing, in fact, the defendant here, rather than the nominal defendant in that action. If they fail to show that, then, of course, you can renew your objection. The objection is overruled."

#### DEFENDANT'S EXCEPTION NO. 5.

"A. It says: 'Dallas, Texas, July 21st, 1913. Messrs. Wynne & Wynne, Wills Point, Texas. Dear Sirs: Referring to the case of Sowders vs. Elmo Rock Company, beg to advise that we have just received a letter from the Pacific Coast Casualty Company, in which they say you must collect your judgment out of the Elmo Rock Company and that then they will

(Deposition of Angus G. Wynne.)

deal with the Elmo Rock Company. We would suggest that you had better obtain execution, if necessary, at once and proceed with the matter, as our client has flatly refused to make payment of this judgment at this time. We are advising Messrs. Dashiell, Crumbaugh & Coon of this condition. Very truly yours, Meador & Davis, by John Davis.' There was some other correspondence that I have not now in my file, but I had execution issued by the District Clerk of Kaufman County, and placed the same in the hands of W. R. Crane, Sheriff of Kaufman County, who levied upon certain property of the Elmo Rock Company—After this return—in the meantime, I had taken the matter up with the General Bonding & Casualty Insurance Company and they had asked me to proceed against the Rock Company and I had alias execution issued and caused the same to be issued on the 9th day of October, 1913, against the Elmo Rock Company and the General Bonding & Casualty Insurance Company.

“Q. To what county?

“A. To Dallas County. That execution I presented in person to the General Bonding & Casualty Insurance Company, and [84—6] they paid to Mr. Sowders and to myself the money, costs and interest called for in said alias execution. Mr. Sowders and ourselves assigned together with the First State Bank at Terrell, I believe, our interest in this judgment to the General Bonding & Casualty Insurance Company.

“Mr. SCOTT.—We move that the latter part of

(Deposition of Angus G. Wynne.)

the answer go out as immaterial, irrelevant and incompetent, and not within the issues of the case.

“The COURT.—Oh, I don’t think that does any harm. Proceed.”

#### DEFENDANT’S EXCEPTION NO. 6.

The WITNESS.—(Continuing.) The letters which I have read into the record are in my possession here at this time. I would rather not have them taken from my files if they can be copied in the record. I would not like to destroy my files. I refuse to part with them. I have never returned that original alias execution into court. That never was executed by the sheriff. The money was paid voluntarily. I will let you have that. I do not care about that execution. The assignment of judgment which I have mentioned as having been made by myself and Mr. Sowders and the First State Bank of Terrell, was made in writing. I was present at the time the signatures were placed to the document and can testify to that fact, and, then, I recognize the signatures of all parties to the same, except that of Wade Fleetwood, Cashier of the First State Bank of Terrell, but I witnessed his signature and I know that he did sign it.

The document so referred to by the witness was then and there exhibited to the witness, and, at the request of attorney for plaintiff, then and there endorsed by the notary as follows, “Plaintiff’s Exhibit No. 1, May 13th, 1914, C. G. Coffey, N. P., Kaufman County, Texas.” [85—7]

(Deposition of Angus G. Wynne.)

“Q. I observe that this assignment recites that the General Bonding & Casualty Insurance Company had paid to the assignors on October 22d, 1913, the sum of \$5,402.50, as the principal and interest of the judgment. Please state whether that sum was actually paid in accordance with that recital?

“A. It was.”

Cross-examination.

(By Mr. TOWNE YOUNG, of Counsel for Defendant.)

The WITNESS.—(Continuing.) The plaintiff in this original suit was J. B. Sowders. He was injured the 11th day of November, 1911. He was an employee at that time of the Elmo Rock Company. The Elmo Rock Company's property was located at Elmo, Texas, in Kaufman County. The original petition was filed on the 9th day of February, 1912. He had no other attorneys than Wynne & Wynne. The original answer was signed by “Meador & Davis, Attorneys for Defendant.” I had correspondence with them prior to the trial of the suit but I have not a copy of all of that. Their letters were not signed at attorneys. They were just signed “Meador & Davis, by John Davis,” and did not show who they were attorneys for. I knew who they were representing. They told me, and from my general knowledge of the case and who were the attorneys for the Elmo Rock Company, and who had been in charge of the Elmo Rock Company's business, and I knew from that and from what Mr. Davis informed me as



(Deposition of Angus G. Wynne.)

to who he was representing. I endeavored to keep it out of the case as much as I could as to who he was representing, in order to avoid a reversal of the case in case I got a judgment. John Davis, of the firm of Meador & Davis, at all times actively conducted the negotiations, the trial and the case. My father, the senior member of our firm, tried the case actively. I had prepared the pleadings [86—8] in the case and had developed the case, but was engaged in Court, at Canton, Texas, part of the time when this case was on trial. I caused the issuance of that first execution. That was directly against the Elmo Rock Company and the General Bonding & Casualty Insurance Company, one as principal and the other as surety, I believe. It shows to have been issued on the 19th day of August, 1913. I included the General Bonding & Casualty Company as I make it a custom to include all parties to the supersedeas bond in every execution I issue. They had signed the supersedeas bond. That execution was levied by the sheriff, as his return shows, on certain property of the Elmo Rock Company. It was not made good out of the property as, in the first place, the property was not worth the money, being subject to certain vendors' liens against it. We knew that we could make but little money out of it, if any. It was levied on certain tracts of land, one, two, or three, I have forgotten which, located near the town of Elmo. I remember something about seeing thirty-six and some odd acres of land in several tracts, but the most of this was subject to vendors' lien notes. This prop-

(Deposition of Angus G. Wynne.)

erty was turned over into the hands of the receiver of the Elmo Rock Company under orders of the Court, as shown by the sheriff's return, and I know that such was done myself. I do not know whether that receivership was pending before the execution was levied. I believe that the levy did bring about the receivership. Since I think about it a minute, I believe that that was the fact. I don't remember when the second or alias execution was issued. I think that the alias was issued in October. It shows to have been issued on the 9th day of October, 1913. I intended to have it issued against both of them, and it shows to have been issued against [87—9] the Elmo Rock Company and General Bonding & Casualty Insurance Company. I personally took it to the office of the Bonding Company and was going to have it served, but they paid the money.

“Q. Who paid the money?

“A. I think that the check was signed by the General Bonding & Casualty Insurance Company, and to them I think we transferred the judgment.

“Mr. SCOTT.—I move that the latter portion of the answer be stricken out as immaterial, irrelevant and incompetent, as to the transfer of the judgment.

“The COURT.—It is a part of the cross-examination.

“Mr. SCOTT.—That is true, your Honor, but not brought out in reply to our question ‘Who paid the money?’

(Deposition of Angus G. Wynne.)

“The COURT.—The motion is denied.”

DEFENDANT'S EXCEPTION NO. 7.

The WITNESS.—(Continuing.) They told me to wait till they consulted their attorneys and tried to get the Pacific Coast Casualty Company to pay it, that they had only gone on the bond at the request of John Davis to protect the Pacific Coast Casualty Company, and that it looked like it wasn't treating them right to make them pay the money, and that they didn't feel like paying it and didn't want to pay it, but they said: “Of course, if we have got to pay it, we don't want to have any execution levied on it, we have got”—I think he said One Hundred Thousand Dollars down here with the Commissioner of Banking & Insurance at Austin, “and we will pay that, if we have to.” They had signed the supersedeas bond.

I knew Mr. Davis in this case at attorney for the Pacific Coast Casualty Company, as an attorney at law. I don't know [88—10] whether he was the attorney in fact or not. I just knew from my knowledge of the case who he was representing and who he told me he was representing, just as any man would acquire that knowledge from the trial of the case. I knew that the other attorneys were representing the Elmo Rock Company to the extent that was necessary, and that he was representing the Pacific Coast Casualty Company under their insurance policy, I didn't know how far his authority extended. I only know that he held himself out to me as being the attorney of the Pacific Coast Casualty

(Deposition of Angus G. Wynne.)

Company, and told me that those were the people that he represented, and I did not see the policy and don't know how far it extended.

Redirect Examination.

(By Mr. LOCKE.)

The WITNESS.—(Continuing.) The original execution was issued to Kaufman County and the alias to Dallas County.

**[Deposition of C. M. Crumbaugh, for Plaintiff.]**

Thereupon there was introduced and read the deposition of C. M. CRUMBAUGH, a witness called for the plaintiff, who testified as follows:

Direct Examination.

(By Mr. LOCKE.)

The WITNESS.—I am C. M. Crumbaugh, and I reside at Terrell, Texas. I am an attorney at law. In 1911 and 1912 I was a partner or member of the firm of Dashiell, Crumbaugh & Coon. We acted as attorneys for the Elmo Rock Company in some matters that they had on hand. I recall the circumstance of the accident happening to one J. B. Sowders, on which a claim was presented by him against the Elmo Rock Company. I was adviser of the Elmo Rock Company during the litigation that [89—11] ensued between that company and Sowders and with regard to the rights of the Elmo Rock Company to indemnity from the Pacific Coast Casualty Company. No objection was made at any time by the Pacific Coast Casualty Company to any of the proceedings taken by the Elmo Rock Company



(Deposition of C. M. Crumbaugh.)

in pursuance of the liability policy which it had—any claim of insufficiency upon the part of that company or of a violation of the terms of the policy in any way. Meador & Davis appeared for the Elmo Rock Company in that litigation under employment by the Pacific Coast Casualty Company. The Pacific Coast Casualty Company controlled the litigation in behalf of the defendant.

“Q. Please state whether at any time the Pacific Coast Casualty Company requested Elmo Rock Company to do anything with reference to assisting and co-operating in the progress of that litigation which was not done by Elmo Rock Company?”

“Mr. SCOTT.—We object to that on the ground that the proper foundation is not laid, and the matter is not shown to be within the knowledge of the witness.

“The COURT.—The objection is overruled.”

DEFENDANT'S EXCEPTION NO. 8.

“A. Nothing that I know of.

The WITNESS. — (Continuing.) The supersedeas bond is signed by Elmo Rock Company by J. B. Whitfield, President, as principal. He was president of that company at that time. He is now dead. The Elmo Rock Company is now in the hands of a receiver. Dashiell, Crumbaugh & Coon, represented Mrs. Whitfield in the receivership proceedings, but I personally conducted the matter. W. D. Fletcher was appointed receiver. He is still acting as such.

“Q. Please state what you know about the pro-

(Deposition of C. M. Crumbaugh.)

ceedings connected [90—12] with the payment of this judgment in so far as Elmo Rock Company and its receiver were concerned.

“Mr. SCOTT.—We object to that on the ground that the record is the best evidence.

“The COURT.—The objection is overruled. It would not necessarily be the record.”

DEFENDANT'S EXCEPTION NO. 9.

“A. After the judgment was rendered in the District Court, the case was duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all of the property of the Elmo Rock Company, covering the land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three days before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a receivership and had all of the property put in the hands of a receiver and stopped the execution.

“Mr. SCOTT.—We move to strike out the portion of the answer which deals with matters of record, as not the best evidence.

“The COURT.—These are matters that are entirely within the personal knowledge of an attorney; he is not stating the contents of a record at all. He

(Deposition of C. M. Crumbaugh.)

is stating steps that were taken. Motion denied.”

DEFENDANT’S EXCEPTION NO. 10. [91—13]

The WITNESS.—(Continuing.) Well, the next I knew of it, Mr. Locke, the surety on the supersedeas bond had paid the indebtedness off. After the receiver was appointed, the company that was on the supersedeas bond sent Mr. Cosnahan down here and he had a conference with me in regard to the matter, and he stated that the company desired to take an assignment from the receiver of any—let me see, now, let’s get that thing straight—to take a transfer from the receiver of any rights that it might have under that policy that had been written by the Pacific Coast Casualty Company in behalf of the Elmo Rock Company. I objected to assigning or transferring that matter, unless the surety company that was on the supersedeas bond would exempt the Elmo Rock Company from any further liability at all in the matter. I believe we had some correspondence along that line, but finally we agreed to sign the instrument which you prepared and sent down here, and it was signed after an order had been obtained from the District Court authorizing the receiver to sign it. That assignment was in writing.

The document so referred to by the witness was then and there exhibited to the witness and, at the request of attorney for plaintiff, then and there endorsed by the notary as follows, “Plaintiff’s Exhibit No. 2, C. G. Coffey, N. P., Kaufman County, Texas, May 13th, 1914.” Said document is marked exhibit

(Deposition of C. M. Crumbaugh.)

“J” attached to plaintiff’s complaint herein.

The various recitals contained in that instrument were in accordance with the facts. I believe the property levied upon by the sheriff and by him turned over to the receiver is still held in the receivership pending the results of the effort of General Bonding & Casualty Insurance Company to collect its disbursement from the Pacific Coast Casualty Company. I believe it all is, except an undivided interest in sixty-six and two-thirds [92—14] acres of land which has been sold under order of the court for the purpose of paying off a vendor’s lien that was held against the interest of the Elmo Rock Company by Mrs. E. F. Bray, of Dallas. That is a lien that underlay the lien of this execution. If anything else has been sold, I don’t know it.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—(Continuing.) I was present at the trial as representative of the Elmo Rock Company. The plaintiff sued for twenty-five thousand dollars general damages, and nine hundred dollars special damages, and two hundred and fifty dollars for physician and surgeon. It was about twenty-six thousand, one hundred and fifty dollars, I believe, all together. I believe I did take active part in the trial. I believe I made an argument. I think I opened the argument. Mr. Davis controlled the trial of the case. I examined no witnesses and took no active part in the case except when it had gone to the jury. I opened the argument for him. My



(Deposition of C. M. Crumbaugh.)

recollection is that we commenced one day and closed the next, but I would not be positive. It might possibly have taken part of three days. No one on behalf of the Pacific Coast Casualty Company asked me to assist in the defense save in a general way. Mr. Davis said he would be glad to have us with him in the case. Mr. Whitfield did this: When the suit was filed down there, he came to us and said that he would like to have his interests as fully protected as possible, and while the Pacific Coast Casualty Company under the terms of their policy had reserved the right to employ their own attorneys and that he could not control that matter, still he felt like he would rather pay a fee and have [93—15] some one down there to look after the case for him, that is, other attorneys, and that is the way we came to be in the case. He paid us a fee for going down there and being present at the trial and assisting in picking the jury and things like that. I can't say that I anticipated a larger judgment than was obtained in the case. I think Mr. Sowders claimed to have been bruised and hurt all over, on his shoulders and body and various parts of his anatomy and particularly, however, one of his legs had been badly damaged, and I think broken, and he claimed that one leg was shorter than the other. He claimed a permanent injury. At the time of the trial he was limping around and had a brace of some kind on his leg, and was supposed to be in pretty bad shape. The Elmo Rock Company never did pay anything under the judgment. The assignment of whatever interest the Elmo Rock Company had in this lia-

(Deposition of C. M. Crumbaugh.)

bility policy was brought to me by Mr. Cosnahan, who was connected with Locke & Locke, as I understand it. I read it very carefully. I did not sign it. I had Mr. Fletcher sign it. He signed it upon my advice. No efforts were made to collect this judgment from the Elmo Rock Company, more than the executions that were issued in the case, as far as I know.

Redirect Examination.

(By Mr. LOCKE.)

“Q. In the conference that took place in the court between yourself and Mr. Cosnahan and Judge Hawkins, it was requested and understood by all the parties that the surety company was to pay this judgment in behalf of the Elmo Rock Company, because it was surety on the supersedeas bond, and that it desired the transfer of the policy in consideration of such payment? [94—16]

“Mr. SCOTT.—We object to that on the ground that it is not redirect examination, and further, that it is immaterial, irrelevant and incompetent; and more particularly, if your Honor please, upon this ground, that the assignment of this policy we claim cannot be the basis of an action against this defendant for the reason that the policy has never been performed—by the terms of the policy requiring payment by the assured—was never performed prior to the assignment, that the assignee has never acted under the policy, that the assignee of the policy made its payment a considerable time before the policy was assigned to it, and in making the pay-

(Deposition of C. M. Crumbaugh.)

ment was—so far as this defendant is concerned—purely a volunteer. We therefore object to that evidence.

“The COURT.—The objection is overruled.”

DEFENDANT’S EXCEPTION NO. 11.

“A. Yes, sir, that was the understanding.

“Q. And the surety company did finally pay the judgment in behalf of the rock company, and because it was surety on the bond?

“Mr. SCOTT.—The same objection.

“The COURT.—The same ruling.”

DEFENDANT’S EXCEPTION NO. 12.

“A. That is my understanding and information about it.”

Recross-examination.

(By Mr. YOUNG.)

The WITNESS.—(Continuing.) I applied for the receivership about the 16th of September, 1913. I would not know anything about the reasonable value of the personal property at the time of the levy as shown by the sheriff’s return. I possibly could give you some approximate idea of the value of the [95—17] land. There were several tracts of land levied on, as well as a list here of personal property. I don’t know anything about that personal property. I should say from my knowledge of land values, regarding as an agricultural proposition and not putting a value on it with reference as to what it might be worth as a stone quarry, that that land was worth approximately forty dollars an

(Deposition of C. M. Crumbaugh.)

acre. That is not with reference to its use by the Elmo Rock Company. Its value as a rock quarry would be purely speculative; at least, we so found it that way, and I have not the slightest idea what it would be worth. I believe the rock company was chartered in 1910. I believe that is when the charter was gotten from the State. I know I had something to do with preparing the matter, and I believe that it was in 1910 that the company was organized and chartered. I do not know anything about the value of the improvements. I am not familiar with those things and could not say. I was connected with the company in a legal way from the time of the incorporation. Well, let me see. I believe that I had something to do with the legal affairs of the Elmo Rock Company before we formed the partnership here of Mr. Dashiell, Mr. Coon and myself. That was some three years ago, or possibly a little more. It may have been in 1910, or possibly it may have been in 1909, I don't know, I don't remember. Off and on, I have had something to do with the Elmo Rock Company down there from the beginning, you might say, and even before it was organized as a corporation. Mr. Whitfield owned the land down there and he had been projecting around with the rock quarry for a long time, and finally organized a corporation, and in a general way I advised them in regard to the business matters of the concern in several instances, but I cannot recall them to mind now and tell you [96—18] specifically what they were.



**[Deposition of W. D. Fletcher, for Plaintiff.]**

Thereupon there was read and introduced in evidence the deposition of W. D. FLETCHER, a witness called for the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURUCE E. LOCKE.)

The WITNESS.—I am W. D. Fletcher, and reside at Terrell, Texas. I am the same W. D. Fletcher who was appointed by the District Court of Kaufman County to be the receiver of Elmo Rock Company. I took possession of the property of that Company. It included that upon which the sheriff of Kaufman County had levied. He turned that property over to me, and I am still holding it in my possession. I sold one piece of property by order of court for the satisfaction of a vendor's lien. To the best of my knowledge the sheriff levied on two or three tracts of land and on a lot of machinery. That property constituted the stone quarry complete and ready for operation. It would be a hard question to answer what was the value at the time I took possession of the property, of the land and machinery and the whole plant, inasmuch as it was rock land there and there was machinery etc., but I think it would represent about something like four or five thousand dollars for the machinery. That is an estimate, however. I guess the value of the land considered as land available for stone quarry purposes was something like a thousand dollars an acre. Elmo Rock Company owned thirteen acres in one tract, and six in another and an undivided one-half

(Deposition of W. D. Fletcher.)

interest in sixty-six and two-third acres. It was all stone land. Aside from the fact that [97—19] the undivided half interest has been sold for the purpose of satisfying a prior lien, all of the remaining property is still in my hands and my administration is held up awaiting the result of this suit. I signed the assignment of this policy under order of court.

The document so referred to by the witness was then and there exhibited to the witness and identified by him as such document and the witness then and there identified his signature to said document, said document being the one so heretofore endorsed for identification by the notary as "Plaintiff's Exhibit No. 2." Said document is marked exhibit "J," attached to plaintiff's complaint herein.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I was appointed receiver of the Elmo Rock Company about the 17th of September, 1913. I had information about the appointment before I was appointed receiver. Judge Crumbaugh came to me and told me that they had levied on the stuff down there and that the only way to get over it was to go into the hands of a receiver, and I told him to go ahead. That was the purpose of the receivership. I had nothing to do with that business. I am in the saddlery and harness and implement business at Terrell. I know nothing about the rock business, only what I have learned since I have been connected with that. I have done nothing only to leave it standing there. It was operated about

(Deposition of W. D. Fletcher.)

two weeks after Mr. Whitfield died and then after that it fell through. It never did much business. It only delivered about one hundred cars of rock all told while it was operating. It had been in operation about six or seven months. I had fifteen hundred dollars, fifteen shares of stock in 1912, prior to the receivership. I still have it. The capital stock of [98-20] the company was ten thousand, five hundred dollars. The other debts against the Elmo Rock Company are numerous. They aggregate about nine or ten thousand dollars. I couldn't really tell hardly. If the company was operated and produced rock to the full extent of its capacity down there, it could easily handle its debts in the course of time. It would take new equipment down there to do that. I have never tried to operate it in any way. There was no order of court about operating the concern. I have not made any reports to the Court of what I have done as receiver, only I reported what was down there to him. I have taken no care of these properties or control. Everything is going to the bad there now. Mrs. Whitfield owns the principal interest in the company. This receivership will last twelve months, I presume. I just trust to the lawyers to tell me those things, just to tell me how long it will last and to let them direct me in it. I could not say whether it will last so long as this judgment is outstanding. The purpose of the receivership was to escape any judgment lien.

(Deposition of W. D. Fletcher.)

Redirect Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—There are all told possibly ten thousand dollars of debts against the company. The lien debts are only on the land. All the liens on the land are prior to this. The land is encumbered about thirty-five hundred dollars, I presume, in liens, and this execution is the only other lien debt.

Recross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—There has been no attempt at foreclosure on behalf of the other lien creditors only on this half interest in this sixty-six acres. I do not know whether all the capital stock has been paid in or not, but that is my understanding. I paid in [99—21] my capital stock in full.

**[Deposition of J. B. Sowders, for Plaintiff.]**

Thereupon there was read and introduced in evidence the deposition of J. B. SOWDERS, a witness called on behalf of the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—My name is J. B. Sowders. I live at Terrell. I was in the employ of the Elmo Rock Company in 1911 or 1912. I have done forgot what year it was. I got hurt in an accident out there in 1911, and I was in the employ of the company at that time. I was operating the machine on the cable. The north derrick fell and left the line machine and all fell with it. I fell and the machine fell too. A



(Deposition of J. B. Sowders.)

fellow by the name of Casgrain was with me, the manager of the company. We all fell down together. It crushed my hip and jaw. I sued the Elmo Rock Company. I tried to get them to pay without it and they wouldn't do it. I tried to get them to help me without it. While I was laid up, they would not come to see me or talk to me or anything, and I just hired a lawyer and sued them. I am the same J. B. Sowders that sued the Elmo Rock Company in the District Court of Kaufman County and got a judgment against it. I got my money. I don't know who paid it. They came and handed it to me. That is all I know. I think the Casualty Company is the one that paid it. (A paper is shown to the witness.)

"Q. That is the assignment of the judgment that you executed, is it?

"Mr. SCOTT.—We make the same objection to that, your [100—22] Honor, except in so far as it is introduced in the nature of a receipt to show a payment of the General Bonding Company.

"The COURT.—This is simply proving the genuineness of the signature.

"Mr. SCOTT.—If it is simply a matter of the authentication of it, I have no objection at this stage.

"Mr. LOCKE.—It is simply a matter of the verification of it.

"Mr. SCOTT.—Very well.

"A. That is my signature; I guess that is it."

The document so referred to by the witness was then and there exhibited to the witness, said document being the one so heretofore endorsed for identi-

(Deposition of J. B. Sowders.)

fication by the notary as "Plaintiff's Exhibit 1," and upon such document being so exhibited to the witness he stated that the name J. B. Sowders appearing on page 5 of that document was his genuine signature.

WITNESS.—(Continuing.) I had assigned an interest in that judgment to the First State Bank of Terrell, and Wynne & Wynne had an interest as my attorneys for their fee, so all three of us joined in signing that assignment.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I do not know whether I have ever read over the assignment or not. They just brought it around and asked me to sign up to get my money and I signed it. I signed it before I got my money. Half was paid to me. Wynne & Wynne got the other half. The First State Bank had an interest for some money I had borrowed and made it a lien against everything I had until I got the judgment, so I could settle with them. [101—23]

**[Deposition of William L. Leeds, for Plaintiff.]**

Thereupon there was read and introduced in evidence the deposition of WILLIAM L. LEEDS, a witness called on behalf of the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—My name is William L. Leeds. I was manager of Miller-Stemmons Company in 1911, as well as a member of the firm, and I hold the same position to-day. On the 18th of June, 1911, we were

(Deposition of William L. Leeds.)

agents for the Pacific Coast Casualty Company. We represented it through the general agency of J. F. Seinsheimer & Company, of Galveston.

(The original policy sued upon in this case, to wit, Policy No. M. E. 36,696, issued under date of June 16th, 1911, to the Elmo Rock Company, was then and there exhibited to the witness, and he testified further as follows:)

The signature to the original policy sued upon in this case, to wit, Policy No. M. E. 36,696, issued under date of June 16th, 1911, to the Elmo Rock Company, is that of Miller-Stemmons Company. That policy was issued, as all policies which we wrote, for the Pacific Coast Casualty Company—that is, the application was taken by us and sent to J. F. Seinsheimer & Co., at Galveston, General Agents, who in turn wrote the policy and returned it to us, and we ran it through our books and countersigned it and delivered it. We collected the premium on it through a broker, Griffiths & Company, of Terrell, Texas. I recall a claim being made against the Elmo Rock Company by one J. B. Sowders for personal injuries sustained by Sowders. A notice was served upon me by Elmo Rock Company of the occurrence of this accident, and we in [102—24] turn, as per our custom, sent the notice to J. F. Seinsheimer & Company, at Galveston, and they in turn either referred the matter to Meador & Davis, Attorneys for the Pacific Coast Casualty Company, or authorized us to do so. It was defended by Meador & Davis, Attorneys for the Pacific Coast Casualty Company.

(Deposition of William L. Leeds.)

No question that I recall was made by the Pacific Coast Casualty Company during the progress of litigation of the case of Sowders vs. Elmo Rock Company regarding the sufficiency of the notice, or the due compliance by Elmo Rock Company with all of its obligations under the policy, or regarding the status of the claim of Sowders as a claim for which Pacific Coast Casualty Company was bound to indemnify Elmo Rock Company. I recall the circumstance of a judgment having been rendered against Elmo Rock Company in the Sowders case, and of the taking of an appeal from that judgment.

“Q. What, if anything, within your knowledge, was done with reference to the making of a superseas appeal bond in that case?

“A. We had the bond made by the General Bonding & Casualty Company of Dallas after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis.

“Mr. SCOTT.—I move that the latter part of the answer go out, ‘after securing an indemnity bond from the Pacific Coast Casualty Company through the Attorneys, Meador & Davis.’ Meador & Davis appears to be the name of a firm of attorneys at law who represent the defendant. There is no authority shown.

“The COURT.—That authority can be shown by the acts of the parties.

“Mr. SCOTT.—It has not been shown.

“The COURT.—I say it may be shown by this very method. [103—25] If it appears thereafter that



(Deposition of William L. Leeds.)

no objection was ever taken to what they did in the matter, the jury has the right to infer authority. Objection overruled. . . . Now, Mr. Scott, I see what your suggestion is as to the statement of the witness that they secured the indemnity from the Pacific Coast Casualty Company through Meador & Davis.

“Mr. SCOTT.—Yes, your Honor.

“The COURT.—I would not regard that as proof of authority.

“Mr. LOCKE.—We simply prove that to show the connection of the indemnity bond with the case.

“The COURT.—Yes. Motion denied.”

#### DEFENDANT'S EXCEPTION NO. 13.

The WITNESS.—(Continuing.) We paid the premium for that bond to the General Bonding & Casualty Insurance Company. By “we” I mean Miller-Stemmons Company. The bond was charged to us direct by the General Bonding & Casualty Company. We first charged Griffiths & Company, of Terrell, Texas, with the premium, inasmuch as they were brokers on the liability policy, and we felt as though they were entitled to the brokerage on the bond as well. They afterwards either advised us that they could not collect or failed to collect, whereupon we transferred the premium to Pacific Coast Casualty Company—that is, transferred the charge for the premium to the Pacific Coast Casualty Company's claim account, which was different from the regular monthly account for the business we wrote for them. About this time, although, after the Paci-

(Deposition of William L. Leeds.)

fic Coast Casualty Company withdrew from the State by reinsuring in another company, the claim account was all closed by Miller-Stemmons Company, being reimbursed with drafts, received from the home office direct or [104—26] from J. F. Seinsheimer & Company, at Galveston, with the exception of this one item, which we afterwards transferred back to our general account, which account covered all policies which we wrote for the Pacific Coast Casualty Company, and the item was finally adjusted in this account in our settlement with them—with their general agents, J. F. Seinsheimer & Company. In this way we finally receive reimbursement for the outlay for the premium. That reimbursement came from Pacific Coast Casualty Company, through its general agents, J. F. Seinsheimer & Company, I presume; at least we made settlement with J. F. Seinsheimer & Company. When the bond had to be made, we called on the General Bonding & Casualty Insurance Company, or I did. I talked to Mr. Stephenson, and he consented to make the bond, provided we secured an indemnity bond from the Pacific Coast Casualty Company, and later the bond was executed by the General Bonding & Casualty Insurance Company. We were not at that time issuing indemnity bonds *of* behalf of the Casualty Company. Meador & Davis issued them. Our agency was confined to the matter of accident insurance, liability insurance and so forth. Meador & Davis were the regularly employed legal representatives of the Pacific Coast Casualty Company in Dallas.

(Deposition of William L. Leeds.)

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I think that Meador & Davis advised us that the bond would have to be made after the case was lost. They explained it was a superseedeas bond. At that time we had a license from the State as agents for the General Bonding & Casualty Insurance Company. However, we only did what was known as a brokerage business. It was quite often the custom to make such bonds as those for the General Bonding & Casualty Insurance Company. Of course we did not sign the bonds ourselves. The [105—27] bonds were always signed by the home office. We simply secured it and sent the application up to the General Bonding Company's office and they forwarded it. These supersedeas bonds then were a part of the business. Of course they were not as common as Fidelity or contract bonds, but they were bonds that we made. But always the principal under the bond had to be strong financially, or put up some collateral or give us some indemnity before they could be made. That is the reason that I called upon the Pacific Coast Casualty Company to give us indemnity, because we were not satisfied with the financial standing of the Elmo Rock Company. We were not acting as agents for the Pacific Coast Casualty Company in getting this bond made, other than we felt that it was to our interest to see that the assured, Elmo Rock Company, was protected, as of course it would have hurt us, or hurt our business, to have had a judgment to go against them direct, without

(Deposition of William L. Leeds.)

using every effort to see that they were protected. We were agents for the Casualty Company, and therefore felt as though it was our duty to see that they were protected in every way until the claim was paid. We, in making this bond, felt as though it was our duty as agents of the Pacific Coast Casualty Company to beat the case, and if not, to carry it to the last resort before anything was finally done with it. Well, we knew that the claim had been made and we knew that the matter had been referred to Meador & Davis to defend the case, and we knew that they had defended the case and that the case had gone against the Elmo Rock Company, and it was either up to the Elmo Rock Company to pay the judgment or the Casualty Company to pay it for them, as per their contract with them, or bond, to be made and fought through the higher courts. We treated this application for this supersedeas bond as part of the Miller-Stemmons business. We handled the case just as though [106—28] it had been any other case where we were not interested otherwise, where we made a commission out of it. We did not take any precautions other than what we would take in any case in order to protect the Bonding Company. We always looked after the interests of the General Bonding & Casualty Insurance Company to see that it was fully protected before we made any bond. We got a commission from this the same as we would in any other case, and we charged the premium to Griffiths & Company, at Terrell, brokers.

“Q. Did you inform the Terrell people, your



(Deposition of William L. Leeds.)

agents, or the Galveston agents, about the action that you had taken in reference to this bond.

“A. I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed.

“Mr. SCOTT.—That we move to go out as merely the conjecture of the witness, and not the best evidence.

“The COURT.—Motion denied.”

#### DEFENDANT'S EXCEPTION NO. 14.

The WITNESS.—That was prior to the application for an execution of the bond.

Redirect examination.

(By Mr. LOCKE.)

The WITNESS.—We have a letter of agency from the Pacific Coast Casualty Company or a certificate of authority from them, as well as from the State at Austin. [107—29] I will find this certificate and furnish the reporter a copy of it if it can be found.

(It was stipulated that if found the same might be attached to the deposition and marked Plaintiff's Exhibit “B.” The same was not so attached to the deposition as returned—)

**[Deposition of John B. Stephenson for Plaintiff.]**

Thereupon there was introduced and read in evidence the deposition of JOHN B. STEPHENSON, a witness called on behalf of the plaintiff, who testified as follows:

Direct Examination

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—I am John B. Stephenson of Dallas, Texas. I am President of the plaintiff, General Bonding & Casualty Insurance Company. That relationship has continued about two years. I was President of the Company on the 6th day of August, 1912. I was the company's general manager at that time. I remember the occurrence of the execution by my company as surety and Elmo Rock Company as principal of the supersedeas appeal bond given under date of August 6th, 1912, in the case of J. B. Sowders vs. Elmo Rock Company, then pending in the District Court of Kaufman County, Texas. I represented the General Bonding & Casualty Insurance Company in the negotiations for the making of that bond.

“Q. Please state as nearly as you can remember [108—30] them, the negotiations that led up to the making of that bond. Give the history of the transaction.

“Mr. SCOTT.—We desire to object on the ground that no proper foundation has been laid relative to the transaction by Mr. Davis in that behalf. My objection may be anticipating the answer.

“The COURT.—Yes, the question is entirely

(Deposition of John B. Stephenson.)

proper. The answer may develop something that you may object to.”

DEFENDANT'S EXCEPTION NO. 15.

“A. Mr. Davis, of the firm of Meador & Davis, telephoned us that he would like to have us execute the bond as surety, and he asked me if we would be in the office and discuss the matter with him. On that day, or the next day—perhaps it was the next day,—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond.

“Mr. SCOTT.—We move that the answer go out as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casualty Company in the defense of this damage suit, and as such attorney at law I think the rule of law is well settled that he has no authority to bind his client in the matter of entering into an agreement for an appeal bond.

“The COURT.—Motion denied.” [109—31]

DEFENDANT'S EXCEPTION NO. 16.

The WITNESS.—(Continuing.) We made some investigation relative to the solvency of the principal of that bond, the Elmo Rock Company. My recollection is that we telephoned Mr. W. P. Allen, of Terrell, and asked him what he thought of the Elmo Rock Company's solvency, and he said that he con-

(Deposition of John B. Stephenson.)

sidered the company perfectly solvent, that he knew the president of the company—J. B. Whitfield, and that he thought that they would be good for five or ten thousand dollars. We made some inquiries with reference to the solvency of the Pacific Coast Casualty Company, and possibly looked up Best's report on the company. We also inquired of Miller-Stemmons Company as to what they thought of the Pacific Coast Casualty Company.

“Q. In whose behalf did Davis represent himself to be acting in applying to you for the execution of this supersedeas bond?

“Mr. SCOTT.—We make the same objection to that, your Honor.

“The COURT.—You understand you cannot prove an agency by the declarations of the agent.

“Mr. LOCKE.—Of course not. It is simply one of the circumstances.

“The COURT.—I think that it is admissible as a part of the transaction. I will let it stand.”

DEFENDANT'S EXCEPTION NO. 17.

“A. In behalf of the Pacific Coast Casualty Company. [110—32]

“Q. Are you familiar with the usages and practices at Dallas, and in the State of Texas, with regard to the procurement by attorneys at law of the execution by surety companies of appeal bonds for their clients?

“A. Yes, sir.

“Q. What is the practice in that regard?

“Mr. SCOTT.—We object to that as immaterial,



(Deposition of John B. Stephenson.)

irrelevant and incompetent, not binding upon the defendant in any manner.

“The COURT.—Let it go in.”

DEFENDANT'S EXCEPTION NO. 18.

“A. Such matters are usually taken up by us with the company's attorney. I don't believe I have ever executed one where the company took the matter up with us direct.

“Q. Please state whether the usage you have described as obtaining in the office of your own company is within your knowledge the general usage obtaining in the office of other insurance companies in this locality?

“Mr. SCOTT.—Same objections, that it is immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

“The COURT.—Objection overruled.”

DEFENDANT'S EXCEPTION NO. 19.

“A. So far as I have any knowledge, it is.

“Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the [111—33] Pacific Coast Casualty Company in the matter of getting a supersedeas appeal bond.

“Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent.

“The COURT.—Let it go in.”

DEFENDANT'S EXCEPTION NO. 20.

“A. We understood he had full authority to act for the Pacific Coast Casualty Company in the mat-

(Deposition of John B. Stephenson.)

ter of procuring a surety on the proposed appeal bond.

“Mr. SCOTT.—We move that that go out as not responsive to the question. It does not state the information, it simply states his conclusion.

“The COURT.—I will hear the balance of it and see what it shows.”

DEFENDANT'S EXCEPTION NO. 21.

“Q. Did Mr. Davis explain to you any limitations upon his authority?

“A. No, sir, he did not.

“Q. Was the matter of his authority discussed between you?

“Mr. SCOTT.—Objected to as immaterial, irrelevant and incompetent, and no foundation laid.

“The COURT.—The objection is overruled. If it should appear that thereafter the case took a course where the defendant here was bound to know, or it was called to its attention that such a contract had been executed on its behalf by Attorney Davis and they made no objection, or acted upon it as though he [112—34] was authorized, that would be, in law, a ratification, and if they did not do anything of the kind, then they cannot be bound by his mere declaration that he acted in certain relations.”

DEFENDANT'S EXCEPTION NO. 22.

“A. Our general information was that the Pacific Coast Casualty Company had been represented by Meador & Davis, and that they had power of attorney to execute any paper for them. The exact amount of their power of attorney we did not know,

(Deposition of John B. Stephenson.)

and did not know what their limit was. We supposed they had full authority in this particular case, or in any other case. We had made other bonds for them, and they had never questioned their power of attorney.

“Q. I find among the papers in the case which you turned over to me with other papers at the time the case was placed in my hands, a letter from Pacific Coast Casualty Company to Meador & Davis, under date of June 28th, 1912, signed in the name of Bernard Silverstein, Attorney. The notary will mark this letter Plaintiff’s Exhibit ‘C’ with the date and his name, and attach it to your deposition. Please examine the letter and state when, to the best of your recollection, you first saw and read this letter, and state how, if you know, this letter got into your files, and when it was delivered to you, if you know.

“A. The first time I saw this letter was some months after the bond was executed, when the attorneys for the plaintiff, Wynne & Wynne—the first time I remember seeing that letter was when Wynne & Wynne were making demand upon us for the payment of this judgment. The letter was likely enclosed with the application, which was executed and mailed us after—I don’t know just how long—but some time after the [113—35] bond was signed. I have no recollection of having seen that letter until I went to examine the papers after there was some trouble over the payment of this claim. It may have been attached to the application, or enclosed with

(Deposition of John B. Stephenson.)

other correspondence which we received from Meador & Davis in regard to this claim.”

The WITNESS.—(Continuing.) We did, as a matter of fact execute the supersedeas bond. As I remember, we were given some kind of indemnity contract. The paper shown to me and marked Plaintiff's Exhibit “D,” is the indemnity contract which we received. (Said contract was thereafter offered in evidence as will more particularly hereafter appear from this bill of exceptions.) The company made payment of the judgment. On October 22d, 1913, \$5,402.50 was paid. That was the amount of the principal sum of the judgment, together with six per cent interest. On October 25th, 1913, we paid \$160.80 court cost, and payment was made to the district clerk of Kaufman County, Texas. No portion of the sum paid by the General Bonding & Casualty Insurance Company to the owners of the judgment, and no portion of the sum paid to the clerk of the court for costs, ever has been repaid to that company for any person.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I know nothing about Meador & Davis' connection with the Pacific Coast Casualty Company in this particular case, except what they told us. He said when he approached us for this bond—his first proposition was that he would indemnify us, or the Pacific Coast Casualty Company would indemnify us, to execute the bond. There was



(Deposition of John B. Stephenson.)

very little discussion as to that. He made a formal application for the bond, which was mailed to us some days after the bond was executed, as [114—36] I remember. I am not sure who furnished him the blank application on which to make the formal application. I don't know whether he took a blank from our office, or whether he used a blank of some other company's form. We have been unable to find that application. The bond was executed and this indemnity agreement and application probably was mailed back to us. That was the way we usually did those things, and we made a number of bonds for him. I am absolutely sure he drew that agreement himself. I presume the application and the indemnity bond came in about the same time. I presume the indemnity is made of even date with the bond. It is not a fact that I required Mr. Davis to sign and deliver this indemnity before the bond was delivered to him. Mr. Davis' first proposition, when he first asked us to make the bond, was a proposition on his part that he would indemnify us with the Pacific Coast Casualty Company. My recollection is that he said that he would draw the indemnity bond and would mail it to us, which he did later. He did not in fact then and there give me or execute to me the indemnity bond. Just what time the letter from the Pacific Coast Casualty Company of date June 28th, with respect to the furnishing of a supersedeas bond, came into our office I could not say, but I know that I never saw the letter until I was called upon

(Deposition of John B. Stephenson.)

to pay the judgment, when we went fully through the files to see what papers we had in connection with the matter. Mr. Davis did not inform me as to the contents of that letter. There was no discussion as to the contents of any letter, or as to his power of attorney, or as to what he thought of the case or anything else, except that he would give us indemnity. I think I remember the transaction very clearly: I usually keep those things in my mind pretty well. I could not say just what time that letter came into the office, but I am sure I did not [115—37] see the letter, or any other papers connected with the letter, until we were called upon to pay the bond. Mr. Davis did not expressly tell me that the Pacific Coast Casualty Company had declined to execute, or cause to be executed, a supersedeas bond.

“Q. Is it not a fact that he stated to you that he did not have authority on behalf of the company to execute a supersedeas bond?

“A. I don't think there was any discussion as to his authority. I never heard his authority questioned. I know we did not question it, and we presumed that he did have full authority. We regarded the firm of Meador & Davis as being a very conscientious firm of attorneys, and we did not question his statement when he told us that he would indemnify us by the Pacific Coast Casualty Company. There was no discussion as to his power of attorney at all.

(Deposition of John B. Stephenson.)

“Q. Have you been able to find this application for this bond?

“A. No, sir. I thought the application was with the papers here, but we have no application covering it.

“Q. Have you investigated to see?

“A. Yes, sir.

“Q. Well, what has become of that application?

“A. I cannot say. I cannot say positively that we ever had an application, but my recollection is that Davis agreed to mail back an application and an indemnity agreement.

“Q. It was usual always in those cases to make a formal application?

“A. Yes, sir. It is not our custom to take an application before we execute a bond, if we are dealing with people that we believe are reliable and they state to us that they will [116—38] execute the application and return it to us, we usually execute the bond and get the application later.

“Q. That has been your custom in other cases?

“A. Yes, sir.

“Q. As a matter of fact, it is the most usual and regular thing for the application and bond to be delivered simultaneously?

“A. We most usually have the application before we execute the bond.”

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[Deposition of John Davis, for Plaintiff.]

Thereupon there was offered and read in evidence the deposition of JOHN DAVIS, a witness pro-

(Deposition of John Davis.)

duced on behalf of the plaintiff, who testified as follows:

Direct Examination.

(By Mr. MAURICE E. LOCKE.)

The WITNESS.—My name is John Davis. I reside in Dallas, Texas. I am an attorney at law and a member of the firm of Meador & Davis. I have been a member of the firm for seven years last past. The firm of Meador & Davis were attorneys for the Pacific Coast Casualty Company during the years 1911 and 1912, in the case of J. B. Sowders vs. Elmo Rock Company. We represented them in other matters as well, but not generally. We just represented them in specific cases that were placed in my hands. They did not, within our knowledge, employ other attorneys at Dallas during the time of our connection with them. They employed us in each specific case in Dallas, and those arising out of the Dallas Agency, within my knowledge, or so far as I know. We defended the case of J. B. Sowders vs. Elmo Rock Company on behalf of the defendant, Elmo Rock Company, [117—39] at the instance of the Pacific Coast Casualty Company. I personally managed the defense of that case. I was in entire control. Dashiell, Crumbaugh & Coon appeared as co-counsel for the defendant. They were the regular attorneys for the Elmo Rock Company, and appeared in a nominal capacity. That was done with my consent. The Pacific Coast Casualty Company was properly and duly notified by the Elmo Rock



(Deposition of John Davis.)

Company of the occurrence of the accident in which J. B. Sowders claims to have been injured. The notice is dated November 17th, 1911. So far as I know it is the primary report. After the receipt of this report the matter was referred to the firm of Meador & Davis for the purpose of investigation and adjustment, and such investigation was made by myself. It resulted in litigation, which I also defended. The Sowders case resulted in a judgment for the plaintiff in the sum of Five thousand Dollars. I then prepared papers looking to an appeal of the case, and advised the Pacific Coast Casualty Company of the result of the trial, and requested that they furnish me a supersedeas bond to perfect the appeal. On June 21st, 1912, I advised the company of the judgment, but I do not see that I made any request for a bond in that letter. The General Bonding Company executed the supersedeas bond upon which the case of Sowders vs. Elmo Rock Company was appealed. The document already marked as Plaintiff's Exhibit "D" (which is set out hereafter), was signed by me and delivered to the General Bonding & Casualty Insurance Company. After carrying the case of Sowders against Elmo Rock Company to the Court of Civil Appeals at Dallas, the judgment of the lower court was affirmed. We then filed an application for a writ of error to the Supreme Court, and that was denied. We moved for a rehearing on the application for a writ of error. The Court refused the motion. The Elmo Rock

(Deposition of John Davis.)

Company prior to the [118—40] final ending of said litigation, did not in any respect fail to co-operate with the Pacific Coast Casualty Company in the defense of the litigation or of the claim, or fail to comply with any request of the Pacific Coast Casualty Company. They performed all obligations and met all requests made by us representing the Pacific Coast Casualty Company, except that they failed and refused to furnish surety on the supersedeas bond. They did not refuse or fail to execute a supersedeas bond themselves as principal.

Cross-examination.

(By Mr. TOWNE YOUNG.)

The WITNESS.—I was employed as attorney at law by the Pacific Coast Casualty Company to represent the Elmo Rock Company in the case of Sowers against the Elmo Rock Company to defend the litigation. That was the extent of my authority; that was what they employed me to do. My observation and experience with this company is that they always required the assured to furnish a supersedeas bond, or furnish surety for the supersedeas bond, but other companies furnish the bonds themselves. I notified Mr. Whitfield as to the practice of this company with reference to giving supersedeas bond. This supersedeas bond was applied for within twenty days. We had to furnish a bond within twenty days after the motion for a rehearing was overruled, but I don't remember the date. I know this, that I wrote the company for the bond, and then they re-

(Deposition of John Davis.)

fused to furnish it and demanded that the assured furnish it, and my time was about expired in which I could file a supersedeas bond and I was up against the proposition of doing the best I could, and my correspondence there shows the condition that I was in and what I did, and whether I did right or not is another question, but I did the best I could under the conditions. [119—41]

“Q. What did you state to Mr. Stephenson with reference to the Bonding Company executing this bond?

“A. Well, Mr. Stephenson had before him the letters from the company in reference to the making of this bond. In fact I delivered one letter to him, in which they said that they would not furnish the bond. The letter speaks for itself.

“Q. When did you deliver that letter?

“A. At the time I made application for the bond.

“Q. When was it, with reference to the time the bond was furnished?

“A. Well, perhaps it was the same day.

“Q. I will ask you to state whether the letter you delivered to Mr. Stephenson was not this letter of June 28th, from Bernard Silverstein?

A. My recollection is that I had two or three letters about that. Yes, sir, this is the letter, of June 28th, 1912. I exhibited that to Mr. Stephenson at the time I made application for the bond.

“Q. What did that letter state with reference to the company furnishing a bond?

“A. Well, I can just read what the letter says;

(Deposition of John Davis.)

it says: 'Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedeas bond, staying execution.'

"Q. Did you say anything additional to this letter to Mr. Stephenson at that time, touching the Pacific Coast Casualty Company and their connection with the supersedeas bond?

"A. I don't recall that I did, but that letter and the instrument which I executed constituted all that I recall that passed between us on that question.

"Q. Well, is it not a fact that you explained the situation [120—42] fully to Mr. Stephenson in reference to the attitude of the Pacific Coast Casualty Company?

"A. Well, along the lines of this letter, certainly. He had that letter before him.

"Q. Is it not a fact that Mr. Stephenson was then and there informed that you or your firm did not have authority to furnish a bond on behalf of the Pacific Coast Casualty Company?

"A. Well, yes. In other words, I did not undertake to vary the authority given to me in that letter. I delivered the letter to him, because I wanted to act in good faith to him.

"Q. Well, what did Mr. Stephenson say?

"A. He said he would make the bond if I would sign a certain instrument which he prepared and presented to me for execution.

"Q. What did he say with reference to this letter of the Pacific Coast Casualty Company?

"A. I don't recall any conversation along those



(Deposition of John Davis.)

lines. In other words, whatever conversation we had, so far as I now remember, was right along the lines of that letter and of this instrument. I have no independent recollection of it, other than that such an occurrence took place.

“Q. Well, you brought home to him the intent and effect of this letter of June 28th, didn’t you?

“A. Well, we had some discussion about it, but the nature of the discussion I don’t remember.

“Q. Well, is it not a fact that thereafter the bond was furnished?

“A. Yes, sir, the bond was furnished after all that happened, as I recall, because I wanted to be fair with Mr. Stephenson [121—43] and let him know the conditions under which I was laboring.

“Q. Now this contract of indemnity, of course that was signed by the ‘Pacific Coast Casualty Company per John Davis, attorney at law and in fact.’ Now, did you sign it in that capacity?

“A. That is my signature and the endorsement made under my name was there at the time I signed it.

“Q. Had you ever represented the Pacific Coast Casualty Company prior to that time in any other capacity than as an attorney at law?

“A. Only in the handling of these several litigated cases that had been referred to us.

“Q. That was in the capacity of attorney at law?

“A. Yes, sir.

“Q. Is it not a fact, Mr. Davis, that Mr. Stephenson, at the time of the execution of the supersedeas

(Deposition of John Davis.)

bond, and prior thereto, was fully advised as to the extent of your authority to represent the company in applying for a supersedeas bond and in making this contract of indemnity?

“A. I will answer that question by saying that all I can swear that Mr. Stephenson knew is what was contained in that letter which I delivered to him.

“Q. Which was delivered prior to the execution of the bond? A. Yes, sir.”

Thereupon there was introduced and read in evidence the following:

**Plaintiff's Exhibit "C" [Letter, June 28, 1912].**

**“PACIFIC COAST CASUALTY COMPANY.  
[122—44]**

“Head Office,

“Merchants' Exchange Building.

“San Francisco, Cal.

“Edmund F. Green, President.

“John C. Coleman, Vice-Pres't.

“Ant. Borel & Co., Treasurer.

“Franklin A. Zane, Secretary.

“Irving C. Morgan, Ass't. Secretary.

“Francis R. Shoemaker, Ass't. Secretary.

“Frank P. Deering, Counsel.

Employers' Liability,

Teams, Elevator, Vessels,

General Liability, Burglary,

Personal Accident, Health,

Plate Glass, Automobile,

Insurance.

Fidelity & Surety Bonds.

“June 28, 1912.

“Meador & Davis,

“Dallas, Texas.

“Gentlemen:

“*In re*: Sowders vs. Elmo Rock Company.

“We beg to acknowledge receipt of your favor of June 21st and have noted contents of same.

“Kindly proceed with the appeal of this case, but you will understand that we do not furnish a super-

sedous bond staying execution.

“Yours very truly,

“BERNARD SILVERSTEIN,

“Attorney.

BS—G.

[Endorsed]: “Plaintiff’s Exhibit ‘C.’ May 16, 1914. C. J. Evans, Jr., N. P. Dallas Co., Texas.”

**Plaintiff’s Exhibits “E-1” and “E-2” [Letters, May 16, 1912].**

“May 16th, 1912.

“Messrs. Meador & Davis,

“Attorneys at Law,

“Dallas, Texas.

“Gentlemen:—

“*In re*: Sowders versus Elmo Rock Company.

“We beg to acknowledge receipt of your favor dated May 4th, in re above, enclosing citation, which we are returning enclosed herein.

“We have instructed you in our wire of May 13th to take charge of this case under a retainer of \$75, which covers fees for all services prior to trial, and in the event that the case goes to trial a trial fee of \$50 per diem. We have today wired you in this matter as follows:

““Sowders matter defend case, but notify defendant we are defending case under a reservation of our rights; send us [123—45] copy of letter.’

“We will ask you to carefully note the attitude of the defendant in this matter. By reason of our denying liability in the Casgrain case and the fact that the Elmo Rock Company is trying to bring us

into this case as a party defendant indicates that we are going to have trouble with them in the Sowders case, and that there will probably be collusion between the Elmo Rock Co. and Sowders, as well as between them and Casgrain. If there is any indication at all that the Elmo Rock Company is not carrying out the provisions of their contract and rendering us every aid in the defense of this suit advise us immediately by wire. We want no misunderstanding in this matter, as we will withdraw from the case upon the least indication that the Elmo Rock Company is trying to do us up in this matter or is not carrying out the provisions of its contract.

“Kindly make a complete and thorough investigation of this matter and advise us fully as to our status in both of these cases; the attitude of the Elmo Rock Co. in this matter, as well as giving us your suggestions and opinion with reference thereto, so that we can guide ourselves accordingly.

“Yours very truly,

BS—K.

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“Attorney.

“Pacific Coast Casualty Company.

“Day Letter.

“May 16th, 1912.

“Meador & Davis,

“Attorneys at Law,

“Dallas, Texas.

“Casgrain matter Griffith not our agent and service on him irregular. Communicate with Seinsheimer Galveston for facts relating to agency. In Sowders



matter defend case but notify defendant we are defending case under a reservation of all of our rights; send us copy of letter.

“PACIFIC COAST CASUALTY CO.

“Chg. A/c Pacific Coast Casualty Co.”

**Plaintiff's Exhibit “E-3” [Letter June 21, 1912].**

“Meador & Davis,

“Attorneys and Counselors at Law,

“Dallas, Texas.

“Dallas, Texas, June 21st, 1912.

“Mr. Bernard Silverstein,

“Attorney,

“San Francisco, Calif.

“Dear Sir:—

*In re* J. B. Sowders vs. Elmo Rock Co. [124—46]

“The writer has just returned from Kaufman, where he has been several days, engaged in the trial of the above-entitled case, resulting in verdict for the plaintiff for \$5,000.00. We believe we have developed a good and sufficient defense, under our pleas of contributory negligence and assumed risk, and confidently expect to reverse and render the judgment of the trial courts in the higher courts. We are proceeding with the preparation of record for appeal, and will keep you fully advised.

“There is no question about the fact that the plaintiff was badly injured, but there is no question about the further fact that he knew his work was dangerous; several other employees quit the job because of the danger, and passers-by remarked to the plaintiff and *other* about the dangers incident to the

work in and around the place. The case was tried before a jury, and where a party is hurt or injured to any degree it is almost impossible to get by the jury; but our fights in this county are made in the trial court, for the purpose of getting a good record, and then appeal on the record to the higher courts, with the hope that the case may be reversed and rendered there.

“Very truly yours,

“MEADOR & DAVIS,

“By (Signed) JOHN DAVIS.

“P. S. We have to say that the Elmo Rock Company furnished us all necessary witnesses and aid; they seemed to be anxious and we believe acted in good faith.

“M. & D.”

**Plaintiff's Exhibit “E-4” [Letter June 28, 1912].**

“June 28, 1912.

“Meador & Davis,

“Dallas, Texas.

“Gentlemen:

“*In re*: Sowders vs. Elmo Rock Company.

“We beg to acknowledge receipt of your favor of June 21st and have noted contents of same.

“Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedous bond staying execution.

“Yours very truly,

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“Attorney.”

“BS—G.

**Plaintiff's Exhibit "E-5" [Letter, July 12, 1913].**

"Terrell, Texas, 7/12/13.

"Copy.

"Messrs. Meador & Davis, Attys.,

"Dallas, Texas. [125—47]

"Gentlemen:—

"I have your letter of July 11th, enclosing supersedious bond in the sum of \$11,000 in the case of Sowders vs. Elmo Rock Company, and note that you ask me to have the bond executed. I have been under the impression that according to the terms of our contract it was the duty of the Pacific Coast Casualty Company to defend this suit in all its branches, and I do not think that I should be called upon to make this appeal bond. At present I must decline to do so, and if you desire any further information you will please confer with Messrs. Dashiell, Crumbaugh & Coon, who are my attorneys.

"Yours very truly,

"(Signed) THE ELMO ROCK CO.,

"By J. B. WHITFIELD, Pres."

---

**Plaintiff's Exhibit "E-6" [Letter, July 13, 1912].**

"Dallas, Texas, 7/13/12.

"Copy.

"Mr. J. B. Whitfield,

"Terrell, Texas.

"Dear Sir:—

"We acknowledge receipt of your favor of the 12th inst. wherein you decline to make supersedeas bond

in the Sowders case. Replying beg to say that we are not familiar with the workings of these details, but we have had requests on assureds for supersedeas bonds in all cases we have ever handled, and said bonds have always been furnished without any question. Your protection is the liability policy in your possession.

“Doubtless, as a reconsideration of this matter, you will furnish the bond, and in the meantime we are proceeding with the matter of appeal in the regular manner.

“Let us hear from you promptly.

“Yours, very truly,

“(Signed) MEADOR & DAVIS.

“Note.

“Leeds—You will note the attached letter from the Elmo Rock Co., as well as above copy of letter just written to them.

“Very truly,

“(Signed) MEADOR & DAVIS,

“By JOHN DAVIS.”

---

**Plaintiff's Exhibit “E-7” [Letter, July 19, 1912].**

**“PACIFIC COAST CASUALTY COMPANY.**

**“Galveston, Texas, 7/19/12.**

**“Pacific Coast Casualty Co.,**

**“San Francisco, California.**

**“Gentlemen:—**

**“Re: Policy 36696—Elmo Rock Company.**

**“We have received from our Dallas Agents copy of letter sent [126—48] by Messrs. Meador &**



Davis to the above assured as well as copy of assured's letter to Messrs. Meador & Davis, copies of which we are enclosing herewith for your information.

"Yours very truly,

"J. F. SEINSHEIMER & COMPANY,

"Per \_\_\_\_\_,

"General Agents."

"JFS/T.

---

**Plaintiff's Exhibit "E-8" [Letter, July 30, 1912].**

"July 30, 1912.

"Meador & Davis,

"Dallas, Texas.

"Gentlemen:—

"*In re*: Sowders vs. Elmo Rock Company.

"We are in receipt of copies of letters from Elmo Rock Company to yourself and your reply to them from *from* J. F. Seinsheimer & Co., contents of which have been noted.

"We endorse your action taken in this matter and will ask you to proceed with the appeal, but the assured must furnish *it* own supersedeous bond.

"As Sheinsheimer & Company are not our agents any longer, we will ask you to kindly communicate direct with us in connection with all cases that you are handling in our behalf.

"Yours very truly,

"BS—G.

\_\_\_\_\_,

"Attorney."

**Plaintiff's Exhibit "E-9" [Letter, July 1, 1913].**

**MEADOR & DAVIS,**

"Attorneys and Counselors at Law,

"Dallas, Texas.

"Dallas, Texas, July 1st, 1913.

"Mr. Bernard Silverstein, Attorney,

"San Francisco, Calif.

"Dear Sir:—

"*In re*: Sowders vs. Elmo Rock Company.

"You will recall that the above suit was for something like \$26,000 damages; that judgment was rendered in trial court for \$5,000.00, and costs. The case was appealed and judgment of the trial court was affirmed by the Court of Civil Appeals; later the Supreme Court refused writ of error, and denied motion for rehearing last week. Execution will be due and issued within the next few days, unless judgment is protected. The Elmo Rock Company, we are informed, is now insolvent, and perhaps in the hands of a receiver,—so that the execution will likely be issued against our Surety on the supersedeas bond, if the judgment is not paid promptly.

"Kindly advise us your wishes in this matter.

"Very truly yours,

"MEADOR & DAVIS,

"By (Signed) JOHN DAVIS." [127—49]

**Plaintiff's Exhibit "E-10" [Letter, July 12, 1913].**

MEADOR & DAVIS,

"Attorneys and Counselors at Law,

"Dallas, Texas.

"Dallas, Texas, July 12th, 1913.

"Mr. Hamilton A. Bauer, Secretary,

"San Francisco, Calif.

"Dear Sir:—

"*In re*: Sowders vs. Elmo Rock Company.

"We acknowledge receipt of your letter of July 7th, 1913, wherein you say: 'In reference to *Souden* versus Elmo Rock Company, if the concern is insolvent, we will pay nothing.'

"At the time this appeal was prosecuted the Elmo Rock Company was a going concern, and it was necessary to give supersedeas bond in penalty of double the amount of judgment, in order to avoid the issuance of execution. The General Bonding & Casualty Insurance Company of Dallas, Texas, made this bond, and as the Elmo Rock Company is insolvent, it will be up to the Bonding Company to pay the judgment. What is your views and practice about this?

"Very truly yours,

"MEADOR & DAVIS,

"By (Signed) JOHN DAVIS.

"P. S. We hand to you bill of costs, rendered by the Clerk of the Court of Appeals, showing due the appellate courts, in the sum of \$27.40.

"M. & D."

**Plaintiff's Exhibit "E-11" [Letter Nov. 24, 1913].**

"November 24, 1913.

"Mr. John Davis,

"c/o Meador & Davis,

"Dallas, Texas.

"Dear Sir:—

"This morning for the first time there was called to the attention of the Pacific Coast Casualty Company instrument which you signed as attorney in fact, August 6, 1912, purporting to indemnify the General Bonding and Casualty Insurance Company, of Texas, against loss by reason of the execution of a certain supersedeas bond in the matter of J. B. Sowders vs. Elmo Rock Company.

"We regret that you should have presumed to represent the Pacific Coast Casualty Company in any other capacity than that in which you are engaged, an attorney at law defending the said litigation, and in that capacity *unly* under instructions.

"We, therefore, upon receiving knowledge of your action in the premises immediately and at our first opportunity repudiated [128—50] each and every act of yours in the premises appertaining.

"A copy of that certain instrument, which is hereby repudiated as executed by you, without authority of *tight* from this Company, is annexed to and made a part of this letter.

"Very truly yours,

"PACIFIC COAST CASUALTY COM-  
PANY,

"HAB—H.

"Vice-President.

"Enc."



**Plaintiff's Exhibit "E-12" [Letter, Undated].**

"MEADOR AND DAVIS,

"Attorneys & Counselors at Law,

"Dallas, Texas.

"Mr. Kirkham Wright,

"Vice-President,

"Pacific Coast Casualty Co.,

"San Francisco, Calif.

"Dear Sir:—

"Your favor of November 24th, 1913, in reference to a certain instrument executed by me on August 6th, 1912, purporting to indemnify the General Bonding & Casualty Insurance Company, received.

"This matter has given me much trouble, and I regret that things are in the present shape. However, it is difficult to always act as one should.

"The facts are, that we were instructed to prosecute the appeal in the Sowders case, but were instructed to call on the Elmo Rock Company, for bond. We did perfect the appeal, except that bond was not made. The Elmo Rock Company did not seem to understand the situation and were haggling over whether they should furnish the bond or not. However, we thought they would finally sign application for the bond; but the time within which we could use the bond was limited, and we went to the General Bonding & Casualty Insurance Company and presented the whole matter to them. This Company was informed that we did not have authority to furnish bond on your behalf; in fact you had written us a letter expressly saying that you would

not furnish the bond,—this letter was delivered to the Bonding Company and has been in their files since on and before the bond in the Sowders case was executed and delivered.

“There are numerous reasons and statements we could give, which would or might justify us in the action taken; but the only thing you are now interested in, is the fact that the Bonding Company was fully advised of the authority we had in the matter, by reason of the letter which you had written to us, and which we delivered to the Bonding Company.

“Very truly yours,

“MEADOR & DAVIS,

“By (Signed) JOHN DAVIS.

“[Endorsed]: Opened and Filed Jul. 11, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.” [129—51]

Thereupon there was introduced and admitted in evidence the policy of insurance sued upon. A copy of said policy of insurance is attached to the complaint on file herein and marked exhibit “A,” and was in the words and figures set forth in said exhibit, to which reference is hereby expressly made, and which said exhibit is hereby made a part hereof.

Thereupon plaintiff offered in evidence the contract of indemnity heretofore referred to in said depositions as Plaintiff’s Exhibit “D.”

“Mr. SCOTT.—We object to the introduction of that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company.

“The COURT.—I will let that go in subject to the objection.”

Defendant's Exception No. 23.

**[Plaintiff's Exhibit “D” (in Bill of Exceptions).]**

The said Plaintiff's Exhibit “D” is in words and figures following, to wit:—

“The State of Texas,

“County of Dallas.

“Whereas, heretofore, to wit, on the — day of —, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrell, Texas, an employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and,

“Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of \$5,000.00 in the District Court of Kaufman County, Texas; and, whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal

from said judgment and prosecute the same to effect; and, whereas [130—52] a supersedeas bond of \$11,000.00 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

“Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

“Witness its hand, this 6th day of August, 1912.

“PACIFIC COAST CASUALTY COMPANY,

“By JOHN DAVIS,

“Its Attorney at Law and in Fact.”

Thereupon Mr. Locke offered in evidence the assignment of the policy.

“Mr. SCOTT.—I would like to make a formal objection to that on the ground that the policy, by the terms thereof, is not assignable, and on the ground that this assignment cannot be made the basis of a cause of action against this defendant for the reason that no payments have been made by the assignees under the terms of this assignment or un-



der the terms of the policy, but that the payment of the judgment by the assignee was a payment made prior to the assignment made on October 22 of this year, whereas the assignment was of November 4, 1913, and such payment is as to the Pacific Coast Casualty Company the payment of a volunteer; that the instrument is immaterial, irrelevant and incompetent as to the Pacific Coast Casualty Company; that furthermore, the assignment appears from the evidence of the plaintiff to have been made in pursuance of a scheme to enable the assured by the assurance and the collusion of the General Bonding Company to avoid and escape its obligation under the policy to make the payment within a certain specified time after the judgment became final. [131—53]

“The COURT.—How is that?

“Mr. SCOTT.—It seems that from the evidence as now disclosed in the case, that a stockholder of the assured company, in order to prevent the assured paying the judgment, as according to the terms of its policy it was required to do, threw it into some sort of a proceeding whereby it had a receiver appointed and is now holding its property in *statu quo*, allowing the bonding company to make the payment while it allows the receiver to preserve its property intact until this suit is disposed of.

“The COURT.—There is not enough evidence to show collusion thus far; what you may show hereafter, I cannot tell.

“Mr. LOCK.—And there is no pleading of collusion.

“The COURT.—No, there is no pleading of collusion. I will permit it to go in.

Said assignment was thereupon introduced in evidence. The assignment is set forth as exhibit “J,” attached to plaintiff’s complaint, and reference is hereby made to said exhibit, and the same is hereby made a part hereof.

#### DEFENDANT’S EXCEPTION NO. 24.

Thereupon the following documents were offered and received in evidence, to wit: Copy of the amended petition on which the case of Sowders against Elmo Rock Company was tried, and which sets forth the plaintiff’s cause of action, which was damages for personal injuries sustained by him while working for the Rock Company; the next was the defendant’s amended original answer upon which the case was tried and which sets up affirmative defenses; the next was the charge of the Court to the jury, which charges the jury on those affirmative [132—54] defenses; the next was the verdict of the jury finding for the plaintiff in the sum of \$5,000; the next was a judgment in favor of plaintiff and against defendant for \$5,000; the next was an order overruling the motion of the Rock Company for a new trial; the next was the supersedeas bond on appeal given by the General Bonding and Casualty Insurance Company in said cause which was in statutory form; the said supersedeas bond is annexed to the complaint of plaintiff on file herein, marked exhibit “E,” and reference is hereby made to said

exhibit and said exhibit is hereby made a part hereof.  
[133—55]

Thereupon plaintiff introduced in evidence a mandate from the Court of Appeals to the District Court, a copy of which said mandate is attached to plaintiff's complaint herein, and marked exhibit "G," to which exhibit reference is hereby expressly made, and said exhibit is hereby made a part hereof.

Plaintiff thereupon introduced in evidence  
J. W. S. the original execution, ~~which was marked~~  
R. S. G. ~~plaintiff's exhibit~~ —, which was in the  
words and figures following:

**[Exhibit—Original Execution.]**

**ORIGINAL EXECUTION.**

**“THE STATE OF TEXAS**

To the Sheriff or any Constable of Kaufman County,  
Greeting:

WHEREAS, on the 18th day of June, 1912, J. B. Sowders recovered a judgment in Cause No. 5774 in the District Court of Kaufman County, against Elmo Rock Company for the sum of Five Thousand Dollars, with interest thereon from the 18th day of June, 1912, at 6 per cent per annum, and all costs of suit, as of record is manifest:

THEREFORE, You are hereby commanded that of the goods and chattels, lands and tenements of the said Elmo Rock Company and General Bonding & Casualty Insurance Company you cause to be made said sum of Five Thousand Dollars, with interest as aforesaid, together with the sum of Two Hundred and Twenty-two  $44/100$  Dollars, costs adjudged against the said Elmo Rock Company and General

Bonding and Casualty Insurance Company and also the further costs of executing this writ.

HEREIN FAIL NOT, and have you the said moneys, together with this writ, before said Court, at the courthouse thereof, in Kaufman, Texas, on the 19th day of September, 1913.

WITNESS my hand and seal of said Court, this 19th day of August, 1913.

W. W. FRANKLIN,

Clerk District Court, Kaufman County, Texas.

(L. S.)

### CLERK'S FEES.

	Dollars.	Cents.
Docketing Cause.....		
Docketing Motions.....		
Issuing 1 Writ Citation.....	.75	
Issuing 1 cop. Writ Citation.....	.50	
Issuing 1 Certified cop. Petition.....		
Issuing 3 Subpoenas for Witness.....	.75	
Issuing 12 Names.....	1.80	
Issuing Subpoena Duces Tecum.....		
Issuing Name.....		
Issuing Notices to Non-resident.....		
Issuing Precept. Interrogatories.....		
Issuing Certified cop. Interrogatories....		
Issuing Commissions to Take Depositions..		
Issuing Execution, and Recording Return..	1.50	
Issuing Order of Sale and Recording Return.....		
Forwarded.....	\$5.30	
[134—56]		
Brought forward.....	\$5.33	



Issuing Writ of Attachment and Rec'ding.  
Return.....

Issuing Writ of Injunction and Rec'ding  
Return.....

Issuing Writ of Sequestration and Rec'd-  
ing Return.....

Issuing Writ of Garnishment and Rec'ding  
Return.....

Issuing Writ of.....

Filing 22 Papers..... 3.30

Entering Appearance..... .30

Entering Continuance.....

Entering 6 Orders..... 4.50

Entering Add'nal Length of Order.....

Entering 1 Judgment..... 1.00

Additional Length of Judgment

Rec'ding Return on Citation.....

Rec'ding Return on Notice.....

Approving 1 Bond..... 1.65

Swearing 15 Witness..... 1.50

Swearing and Impaneling Jury..... .35

Receiving and Recording Verdict..... .35

Admin'ing Oath Without Seal.....

Admin'ing Oath With Seal.....

14 Certificates With Seal..... 7.00

11 Certificates Witness Claims..... 62.54

Assessing Damages.....

Transcript.... Words..... 10.00

*General Bonding and Casualty Ins. Co.* 157

Taxing Costs and Copy.....	.25
Cost Court of Civil Appeals &.....	27.40
Supreme Court.....	

---

Total Clerk's Fees.....	\$103.94
	1.50

---

\$105.44

SHERIFF'S FEES:

Executing Citation and .... miles....	2.00
Executing Precept and .... miles....	
Executing Attachment and .... miles....	
Executing Seques'tion and .... miles....	
Executing Garnishment and .... miles....	
Executing Possession and .... miles....	
Executing Injunction and .... miles....	
Executing Scire Facias and .... miles....	
Executing Restitution and .... miles....	
Serving Notice and .... miles....	
Summon'g Witness and .... miles....	13.00
Summon'g Witness and .... miles....	
Jury Fee.....	
Levying.....	
Posting.....	
Appraising.....	
Advertising.....	
Taking Care of Property.....	
Taking Bond.....	
Making Deed.....	
Commissions.....	

Return, Writ of.....

.....

.....

.....

.....

---

Total Sheriff's Fees..... 15.00

[135—57]

## RECAPITULATION:

Clerk's Fees.....

Sheriff's Fees.....

County Judge's Fees.....

Jury Fees.....

Printer's Fees.....

Notary's Fees.....

Stenographer's Fees..... 3.00

Attorney's Fees.....

Witness Fees.....

.....

.....

..... 105.44

---

Total Costs.....\$222.44

I certify that the foregoing Bill of Costs is a true and correct bill of the costs adjudged against the defendant in the cause wherein this Writ of Execution is issued. This 19<sup>th</sup> day of August, 1913.

W. W. FRANKLIN,

Clerk District Court, Kaufman County, Texas.

By \_\_\_\_\_,

Deputy."

Thereupon plaintiff introduced in evidence  
J. W. S. the Sheriff's Return, ~~which was marked~~  
R. S. G. ~~Plaintiff's Exhibit~~ ———, and which was in  
the words and figures following:

**[Exhibit—Sheriff's Return.]**

**SHERIFF'S RETURN.**

(Acts 1903, p. 104.)

Came to hand the 20 day of August, A. D. 1913,  
at — o'clock ——— M., and executed on the 5 day  
of September, A. D. 1913, at 10 o'clock A. M., by  
levying upon the following described land and prop-  
erty of the defendant and situated in Kaufman  
County, Texas, viz.:

Situated in Kaufman County, Texas, being a part  
of the R. G. Cartwright survey and being Block  
No. 1 of the subdivision of the D. H. Mallory com-  
munity estate lands. First Tract Beginning 406  
varas North 45° west of the South Corner of 240  
acres of land deeded to R. A. Mallory. Thence  
North 45° West 528 varas to corner. Thence North  
49° East 700 varas to corner on Southwest line of  
160 acres of land deeded to C. A. Dodd et al. Thence  
South 45° East 598 varas to corner. Thence South  
45° West 680 varas to the place of beginning, con-  
taining 66¾ acres of land which is the same land  
designated as tract No. 1 in the deed from R. A.  
Mallory to C. M. Kitchen dated August 31, 1900,  
and duly recorded in the Deed records of Kaufman  
County, Texas. Second Tract, also a part of the  
said R. G. Cartwright survey—Beginning at the  
N. E. corner of Block No. 18 of the McCorkles addi-



tion to the town of Elmo. Thence North 264 feet to corner, Thence East 330 feet corner, Thence South 264 feet corner. Thence West 330 feet to the place of beginning, containing 2 acres of land more or less. Third Tract, Lot No. 2 in Block No. 18 of McCorkles addition to the town of Elmo, Kaufman County, Texas, and being one-half acre more or less. Fourth Tract. Beginning 50 feet North without variation from the N. E. corner of Block No. 14, of said McCorkles addition to said town of Elmo on the North side of said town at the S. E. corner of Block No. 19 of said addition, Thence North without variation 450 varas, Thence North  $86^{\circ}$  West 215 varas corner, Thence South  $35^{\circ}$  West 86 vrs. Thence South  $2^{\circ}$  East 350 vrs. Thence South  $86^{\circ}$  East 208 varas to the place of beginning, and containing 16 acres of land [136—58] more or less. Said last-named tracts numbered —, being the same land conveyed by C M K J B W & J D W to Elmo Rock Co. on Aug. 24, 1909, as shown by deed duly recorded in Vol. 128, pages 180, 181, Deed Records, Kaufman County, Texas.

And to the following described property, to wit: One upright Gardner Engine, one independent pump, one Buffords hand forge, two screw vices, eight long-handled shovels, four rock picks, two crow bars, 100 pounds of bolts, one-fourth barrel lubricating oil, one six-inch leather belt 25 feet long, one 10 inch leather belt 25 feet long, one S. Wrench 24 inches, six drill points, one rock crusher, one 12x4 rock screen, 10 pcs. 12x12—24 feet long, six tram cars, 400 feet of tramway, 200 feet  $11\frac{1}{4}$  inch piping,

one concrete tank 6x8, 500 guy wire, 1500 feet, one inch cable, one gasoline engine, one gin tank 4x3, one rock dipper, one closet 4x6x8, 200 feet 2-inch piping, one American hoist derrick boiler, 4 wheeler scrapers, one steam rock drill, one sheet-iron house, 22x28x9, 50 feet galvanized guttering, 5 pcs. sheet-iron roofing, 5x3, said property being levied on as the property of Elmo Rock Company.

And afterwards, on the 5 day of Sept., A. D. 1913, advertised the same for sale at the courthouse door of Kaufman County, on the 7 day of October, A. D. 1913, being the first Tuesday of said month (\*by an advertisement, in the English language, published once a week for three consecutive weeks preceding such sale, the first publication appearing not less than twenty days immediately preceding the day of sale, beginning on the 12 day of September, A. D. 1913, in Kaufman Herald, a newspaper published in the County of Kaufman, stating in said advertisement the authority by virtue of which said sale was to be made, the time of levy, the time and place of sale, a brief description of the property to be sold; the number of acres, the original survey, its locality in the county, and the name by which the land is generally known), (by written advertisement posted for twenty successive days next before the day of sale at three public places in the County of Kaufman, one of which is at the courthouse door of said county); and also mailed (delivered or mailed) to each of the within-named defendants a copy of said notice of sale; and also mailed a copy

of said notice of sale to ———, defendant's attorney of record in said cause.

And on the 17th day of September, A. D. 1913, I turned said property over to W. D. Fletcher, Receiver for the said Elmo Rock Company, under orders of the District Court of Kaufman County, Texas. The same was delivered to said Receiver and left in his charge, as it was under the order of the Court. Said Receiver qualifying as receiver on the 20th day of September, 1913.

No property of the General Bonding and Casualty Insurance Company, the other Defendant in execution, found in Kaufman County, Texas.

And on the 7 day of October, A. D. 1913, plaintiff, by his attorney, ordered further execution of this writ stopped by virtue of said order. No sale was made and no collection. Hence, this writ is accordingly herewith and hereby returned.

I actually and necessarily traveled 40 miles in the service of this writ:

W. R. CRANE,  
Sheriff, Kaufman County, Texas.

By —————,  
Deputy.

\*If no newspaper will publish said advertisement, then so state, strike out the first clause and leave the clause showing advertisement "posted," etc. If published in newspaper, strike out the clause in regard to posting. [137—59]

SHERIFF'S FEES:

<i>Levys</i> .....	\$2.00
Advertising.....	1.00
Serving 3 Notices at \$1.00 each.....	3.00
Commissions.....	
Return of Writ.....	.50
Milage 40 Miles.....	2.00
Printer's Fees.....	5.00
<hr/>	
Total.....	\$13.50
Original Court Costs .....	
<hr/>	

Total Amount of Costs." \$.....

(Back of Original Execution.)

"File No.5774

District.

COURT

Kaufman.

County

Term 1912

J. B. Sowers

vs. (Execution, with Bill of Costs.

(Fi. Fa. No.——

Elmo Rock Company

& Bonding Casualty Insurance Company.

Issued 19 day of August, 1913

Returnable in 30 days.

W. W. Franklin, Clerk,

Dist. Court Kaufman, County

\_\_\_\_\_, Deputy

Filed \_\_\_\_ day of \_\_\_\_ 19\_\_\_\_

\_\_\_\_Clerk

\_\_\_\_Deputy

Judgment... ..\$.....



Interest.....  
 Original Costs.....  
 Subsequent Costs.....  
 .....

Total Amount Due... ..\$.....”

Thereupon there was introduced in evidence a  
 J. W. S. partial transcript of the proceedings in the  
 R. S. G. Court of Civil Appeals; said document ~~was~~  
 marked Plaintiff's Exhibit —, and is in the words  
 and figures following:

**Exhibit—Partial [Transcript of Proceedings in  
 Court of Civil Appeals.]**

*“In the Court of Civil Appeals for the Fifth  
 Supreme Judicial District of Texas. [138—60]*

No. 6840.

ELMO ROCK COMPANY,

Appellant,

v.

J. B. SOWDERS.

Appellee.

**PARTIAL TRANSCRIPT OF PROCEEDINGS.**

1.

From District Court, Kaufman County.

Saturday, March 15th, 1914.

6840

**JUDGMENT.**

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

Opinion of the Court delivered by Mr. Rainey, Chief Justice. This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed, that the appellee, J. B. Sowders, do have and recover of appellant, Elmo Rock Company, and General Bonding and Casualty Insurance Company, its surety upon appeal bond, the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance.

2.

Saturday, March 29th, 1914.

6019

6840

ORDER OVERRULING APPELLANT'S.  
MOTION FOR REHEARING.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

This day came on to be heard the motion of appellant for rehearing of this cause and the same being inspected, it is considered, adjudged and ordered that the said motion be overruled.

3.

From Kaufman County, Fifth District.

May 28, 1913.

Certified Copy of Judgment of Supreme Court.

“IN SUPREME COURT OF TEXAS.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

This day came on to be heard the application of Elmo Rock Company, for a writ of error to the Court of Civil Appeals for [139—61] the Fifth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant Elmo Rock Company, and its surety, General Bonding & Casualty Insurance Company pay all costs incurred on its application.

I, F. T. CONNERLY, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above-styled cause.

Witness my hand and seal of said court, this the 30th day of June, A. D. 1913.

F. T. CONNERLY,

Clerk,

[Seal] By—————Deputy.

Motion for rehearing overruled June 27, 1913.

[Endorsed]: “Application No. 8202 Elmo Rock Company vs. J. B. Sowders. Copy of Judgment in Supreme Court. Application for writ of error refused.”

[Endorsed]: "Filed in Court of Civil Appeals  
Jul. 5, 1913. Geo. W. Blair, Clerk 5th District."

4.

BILL OF COSTS IN SUPREME COURT.

Clerk's Office, Supreme Court.

No. 8202.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

CERTIFIED COPY BILL OF COSTS SUPREME  
COURT.

Filing Application....	50
Docketing Petition....	50
Entering Appearance of Counsel ....	50
Filing two Briefs....	60
Filing Three Papers....	90
Entering Orders....	1.00
Entering Judgment on Application....	1.00
Certified Copy of Judgment,.....	1.00
Taxing Costs of Application....	50
Certified Copy Bill of Costs,.....	1.00
Filing and Entering Motion....	.55

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Total, 8.05

I, F. T. CONNERLY, Clerk of the Supreme Court  
of Texas, hereby certify that the above copy of the  
original bill of costs is true and correct.

WITNESS MY HAND and seal of said court  
at Austin, this the 30th day of June, 1913.

[Seal]

F. T. CONNERLY,  
Clerk, [140-62]



[Endorsed]: "Application. No. 8202. Certified Copy Bill of Costs in Supreme Court, Austin. Elmo Rock Company vs. J. B. Sowders, \$8.05. Filed in Court of Civil Appeals Jul. 5, 1913, Geo. W. Blair, Clerk 5th District."

The State of Texas,

County of Dallas.

I, Geo. W. Blair, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, do hereby certify that the foregoing partial transcript of proceedings had in the cause formerly pending in said court and entitled Elmo Rock Company, appellant, v. J. B. Sowders, appellee, and numbered 6840 upon the docket of said court, comprises a full, true and complete copy of each of the papers, file marks, entries and proceedings in said cause therein purporting to be shown, to wit:

1. Judgment of said Court of Civil Appeals.
2. Order overruling appellant's motion for rehearing.

3. Certified copy of Judgment of Supreme Court.

4. Bill of costs in Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said court at my office in Dallas, Dallas County, Texas, this the 1st day of May, 1914.

GEO. W. BLAIR,

Clerk of Court of Civil Appeals for the Fifth  
Supreme Judicial District of Texas.

The State of Texas,

County of Kaufman.

I, Anson Rainey, Chief Justice of the Court of Civil Appeals for the Fifth Supreme Judicial

District of Texas, do hereby certify that George W. Blair, is the clerk of said court, and that his foregoing attestation is in due form.

Witness my hand this the 1st day of May, 1914.

ANSON RAINEY,

Chief Justice of Court of Civil Appeals for Fifth  
Supreme Judicial District of Texas.

The State of Texas,  
County of Dallas.

I, Geo. W. Blair, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, do hereby certify that Anson Rainey is the Chief Justice of said court and that his genuine signature is appended to the foregoing certificate.

Given under my hand and the seal of said court at my office in Dallas, Dallas County, Texas, this the 1st day of May, 1914.

[Seal]

GEO. W. BLAIR,

Clerk of Court of Civil Appeals for 5th Supreme  
Judicial District of Texas." [141—63]

Thereupon plaintiff introduced, and there  
J. W. S. was received in evidence ~~and marked Exhibit~~  
R. S. G. —, a partial transcript of the proceedings in the Supreme Court, in the words and figures following, to wit:

“IN THE SUPREME COURT OF TEXAS.

App. No. 8202.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

PARTIAL TRANSCRIPT OF PROCEEDINGS.

ORDER REFUSING WRIT OF ERROR.

From Kaufman County, Fifth District

App. No. 8202.

May 28th, 1913

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

This day came on to be heard the application of the Elmo Rock Company for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said application be refused; that the applicant, Elmo Rock Company, and its surety General Bond & Casualty Insurance Company, pay all costs incurred on this application.

ORDER OVERRULING MOTION FOR RE-  
HEARING.

From Kaufman County, Fifth District.

Mo. No. 2979.

App. No. 8202.

June 25th, 1913.

ELMO ROCK COMPANY,

vs.

J. B. SOWDERS.

Motion for rehearing of App. No. 8202,—MOTION  
OVERRULED.

The State of Texas,  
County of Travis.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing partial transcript of proceedings had in the cause formerly pending in said court upon application for a writ of error, and entitled Elmo Rock Company vs. J. B. Sowders, and numbered 8202 upon the application docket of said court, comprises a full, true and complete copy of each of the entries and proceedings in said cause therein purporting to be shown, to wit:

1. Order refusing writ of error;
2. Order overruling motion for rehearing. [142-64]

IN TESTIMONY WHEREOF I have hereunto set my hand and the seal of said court at my office in Austin, Travis County, Texas, this the 1st day of May, 1914.

[Seal]

F. T. CONNERLY,  
Clerk of Supreme Court of Texas.

The State of Texas,  
County of Travis.

I, Thomas J. Brown, Chief Justice of the Supreme Court of Texas, do hereby certify that F. T. Connerly is the Clerk of said Court, and that his foregoing attestation is in due form.



WITNESS MY HAND this the 1st day of May, 1914.

T. J. BROWN,

Chief Justice of Supreme Court of Texas.

The State of Texas,

County of Travis.

I, F. T. CONNERLY, Clerk of the Supreme Court of Texas, do hereby certify that Thomas J. Brown is the Chief Justice of said court, and that his genuine signature is appended to the foregoing certificate.

GIVEN UNDER MY HAND and the seal of said court at my office in Austin, Travis County, Texas, this the 1st day of May, 1914.

[Seal]

F. T. CONNERLY,

Clerk of Supreme Court of Texas."

Thereupon there was introduced and received J. W. S. in evidence, ~~and marked Plaintiff's Exhibit~~  
K. S. G. —, document entitled "Partial Transcript of Proceedings," in the District Court, in the Receivership case, which document was in the words and figures following, to wit:

**[Exhibit—Partial Transcript of Proceedings in District Court in Receivership Case.]**

**IN THE DISTRICT COURT OF KAUFMAN,  
COUNTY, TEXAS.**

No. 6007.

NELLIE WHITFIELD, Administratrix of the  
Estate of J. B. WHITFIELD, Deceased,

vs.

ELMO ROCK COMPANY.

PARTIAL TRANSCRIPT OF PROCEEDINGS.

[143-65]

1.

Plaintiff's Original Petition.

"No. —

*In the District Court of Kaufman County, Texas.*

Sept. Term, A. D. 1913.

Mrs. NELLIE WHITFIELD, Adminstratrix,

vs.

ELMO ROCK COMPANY et al.

To the Hon. F. L. HAWKINS, Judge of said Court:

Your petitioner, Mrs. Nellie Whitfield, Administratrix of the Estate of J. B. Whitfield, deceased, complaining of The Elmo Rock Company, a corporation, respectfully shows to the Court:

FIRST.

That the plaintiff resides in Terrell, Kaufman County, Texas, and has been duly appointed administratrix of the Estate of J. B. Whitfield, dec'd, by the Probate Court of Kaufman County, Tx., and has been duly qualified as such; that the Elmo Rock Company is a corporation, having its principal office and place of business in the City of Terrell, Kaufman County, Texas; that J. B. Whitfield was formerly President of said Corporation, but is now deceased, and A. B. Casgrain was formerly its Vice-president, but he has now left the State of Texas, as petitioner is informed and believes, and his whereabouts are unknown; that there is now but one officer known to this plaintiff, of said Corporation; to wit: J. D. Whitfield, Secretary and Treasurer thereof, who resides at Heath, Rockwall County, Texas.

## SECOND.

Your petitioner shows that the estate of J. B. Whitfield, deceased, of which petitioner is administratrix, owns and holds a majority of the capital stock of The Elmo Rock Company, to wit, the sum of about \$5500.00; that said Elmo Rock Company was engaged in the business of mining and quarrying rock and stone, having its quarry and crusher located in the town of Elmo, Kaufman County Texas; that said plant was in operation up to the time of the death of the said J. B. Whitfield, which accured in December, 1912; that since the death of the said Whitfield said plant has ceased to be operated; that the Directors of said Corporation have never elected any other President or Vice-president, and that in fact there are no Directors of said Corporation left, except the said J. D. Whitfield; and that said J. D. Whitfield has long since ceased to give any attention to the affairs of said company; that said Elmo Rock Company owns large and valuable properties; to wit an undivided one-half interest in  $66\frac{3}{4}$  acres of land on the R. G. Cartwright Survey in Kaufman County, Texas; two acres of land on the same survey; one-half acre of land on the same survey, and 16 acres, more or less, on the same survey, more fully described in exhibit "A" hereto attached and made a part hereof together with its rock-crushing plant, machinery, boilers, engines, tools, tram cars and other appurtenances and appliances.

## THIRD.

Your petitioner shows to the Court that since the death of the said Whitfield, said machinery and

rock-crushing plant of said Elmo Rock Company has not been operated, and that said properties have received no care or attention at the hands of any officer of said Company; that the tools and appliances are being wasted and destroyed; that the machinery is being exposed to the elements, and is deteriorating rapidly, and that it is necessary that some one should take charge of the business for the purpose of winding up its affairs, selling off its assets and paying its debts. [144—66]

FOURTH.

Your petitioner shows to the Court that said Elmo Rock Company is largely indebted to divers and sundry persons, approximating the sum of \$15,000.00; that said debts are all past due, and creditors are demanding their payment; that there is no money in the treasury of said Company, and it has no other assets except the lands above herein described, and the plant situated thereon; that the assets of said Company are totally inadequate to pay its debts, and said Company is and has been for many months insolvent.

Wherefore, premises considered, plaintiff prays that your Honor appoint a Receiver to take charge of the business and assets of said Elmo Rock Company, and proceed to wind up its affairs, sell its properties and pay off its indebtedness, and for such other and further orders and decrees as to the Court may seem proper.

DASHIEL L. CRUMBAUGH & COON,

Attorneys for Plaintiff.

BEFORE me, the undersigned authority, on this day personally appeared C. M. Crumbaugh, who



being duly sworn says on oath that he is one of the attorneys for the plaintiff in the above-styled cause, and that the matters and facts set out in the above plea are true, to the best of his knowledge and belief.

C. M. CRUMBAUGH.

Subscribed and sworn to before me, this 16th day of September, A. D. 1913.

[Notarial Seal]

C. G. COFFEY,

Notary Public, Kaufman County, Texas.

‘EXHIBIT A.’

Situate in Kaufman County, Texas, being a part of the R. G. Cartwright Survey and being block No. 1, of the subdivision of the D. H. Mallory community estate lands.

#### FIRST TRACT.

Beginning 406 varas North 45 deg. West of the South corner of the 240 acres of land deed to R. A. Mallory. Thence North 45 deg. West 528 Varas to corner. Thence North 49 deg. East 700 varas to corner on Southwest line of 160 acres of land deeded to C. A. Dodd, et al. Thence South 45 deg. East 598 varas to corner. Thence South 45 deg. West 680 varas to the place of beginning. Containing 66  $\frac{3}{4}$  acres of land, which is the same land designated as Tract No. 1, in the deed from R. A. Mallory to C. M. Kitchen, dated August 31, 1900, and duly recorded in the Deed Records of Kaufman County, Texas.

#### SECOND TRACT.

Also a part of the said R. G. Cartwright Survey, Beginning at the N.E. corner of Block No. 18, of the

McCorkles Addition to the town of Elmo. Thence North 264 feet to corner. Thence East 330 feet corner. Thence South 264 feet corner. Thence West 330 feet to the place of beginning, containing 2 acres of land, more or less.

### THIRD TRACT.

Lot No. 2 in Block No. 18, of McCorkles Addition to the town of Elmo, Kaufman County, Texas, and being one-half acre, more or less.

### FOURTH TRACT.

Beginning 50 feet North without variation from the N. E. corner of Block No. 14 of said McCorkles Addition to said town of Elmo on the north side of said town at the S. E. corner of Block No. 19 of said addition. Thence North without variation [145—67] 450 varas. Thence North 86 deg. West 215 varas, corner. Thence South 35 deg. West 86 varas. Thence South 2 deg. East 350 varas. Thence South 86 deg. East 208 varas to the place of beginning, and containing 16 acres of land, more or less.

Filed Sept. 7th, 1913. W. W. Franklin.  
Vol. 16—106-107.”

2.

### WAIVER OF SERVICE BY ELMO ROCK COMPANY.

“No. —.

Sept. Term, 1913.

*In the District Court of Kaufman County, Texas.*

Mrs. NELLIE WHITEFIELD, Administratrix,

vs.

ELMO ROCK COMPANY.

Comes now J. D. Whitfield, Secretary and Treasurer of the Elmo Rock Company, and being fully advised of the application of the plaintiff for a Receivership against the said Elmo Company, hereby waives the issuance of citation and service of same, and enters an appearance for the said Elmo Rock Company, defendant in said cause, at this present September Term of the District Court, and joins in with said plaintiff in her prayer for a Receiver.

J. D. WHITFIELD,

Secretary and Treasurer of the Elmo Rock Company.”

3.

ORDER APPOINTING RECEIVER ENDORSED  
ON PETITION.

“Sept. 17th, 1913.

This day came on to be heard the application of Mrs. Nellie Whitfield administratrix of the estate of J. B. Whitfield, deceased, praying for the appointment of a Receiver for The Elmo Rock Company, a corporation duly organized under the laws of Texas and having its principal place of business at Elmo in Kaufman County, Texas; And it appearing to the court from allegations in petition that said Elmo Rock Company is insolvent and that its assets are being wasted and dissipated and that there is no officer or other proper person in charge of the affairs of said corporation and that it is necessary that some one should be placed in charge thereof to preserve the property and wind up the business of said corporation; and it further appearing to the Court from said petition that said Elmo Rock

Company is largely indebted; and it further appearing to the Court that W. D. Fletcher a citizen of Terrel, Kaufman County, Texas, is a proper person to be appointed Receiver for said corporation;

It is therefore ordered by the Court that said W. D. Fletcher be and he is hereby appointed Receiver of said Elmo Rock Company, and his bond as such Receiver is fixed at the sum of \$2500.00; it is further ordered by the Court that upon the said W. D. Fletcher [146—68] filing in this said court his said bond with two good and sufficient sureties to be approved by this court and taking the oath required by law, that he take possession of all the assets and properties of said The Elmo Rock Company of every kind and character, and that he hold same subject to the further orders of this court.

F. L. HAWKINS,  
Judge 40th Judicial District."

4.

#### BOND AND OATH OF RECEIVER.

*In the District Court of Kaufman County, Texas.*

Mrs. NELLIE WHITFIELD, Administratrix,

vs.

ELMO ROCK COMPANY.

The State of Texas,

County of Kaufman.

KNOW ALL MEN BY THESE PRESENTS:  
That we, W. D. Fletcher, as principal, and Commonwealth Bonding & Casualty Ins. Co., as sureties, are held and firmly bound unto F. L. Hawkins, Judge of the 40th Judicial District of Texas, in the penal



sum of Twenty-five Hundred (\$2500.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas, the said W. D. Fletcher has been appointed by Hon. F. L. Hawkins, Judge of the 40th Judicial District of Texas, Receiver for the Elmo Rock Company, in the action of Mrs. Nellie Whitfield, Administratrix, vs. The Elmo Rock Company.

NOW, if the said W. D. Fletcher shall faithfully discharge all of the duties of Receiver in said action, and obey to orders of the Court therein, then this obligation shall be null and void, otherwise to remain in full force and effect.

Witness our hands, this 19th day of September, A. D. 1913.

W. D. FLETCHER,  
COMMONWEALTH BONDING & CASU-  
ALTY INS CO.

By CLARENCE G. COFFEY,  
Attorney in Fact.

The State of Texas,  
County of Kaufman.

I, W. D. Fletcher, Receiver of the The Elmo Rock Company, solemnly swear that I will faithfully perform all the duties of Receiver of said Elmo Rock Company, to the best of my skill and ability.

[Seal]

W. D. FLETCHER,

Subscribed and sworn to before me, this 18th day of September, A. D. 1913.

C. G. COFFEY,  
Notary Public, Kaufman County, Texas.

Filed Sept. 20th, 1913. W. W. Franklin, District Clerk." [147—69]

5.

*In the District Court, Kaufman County, Texas,*  
Oct. 31, 1913.

No. 6007.

ORDER FOR TRANSFER OF LIABILITY  
POLICY.

"MRS. NELLIE WHITFIELD, Administratrix,  
vs.

ELMO ROCK COMPANY.

The receiver of the Elmo Rock Company heretofore appointed by the Court is authorized by said Court to assign and deliver to the General Bonding and Casualty Insurance Company Policy No. M. E. 36696 issued by the Pacific Coast Casualty Company to the Elmo Rock Company.

The State of Texas,  
County of Kaufman.

I, W. W. Franklin, clerk of the District Court of Kaufman County, Texas, do hereby certify that the foregoing partial transcript of proceedings had in the cause pending in said court and entitled Nellie Whitfield, Administratrix, v. Elmo Rock Company, and numbered 6007 upon the docket of said court, comprises a full, true and complete copy of each of the papers, entries and proceedings in said cause

therein purporting to be shown, each paper, entry and proceeding being found upon the page or pages indicated by the following list:

1. Plaintiff's original petition, pp. 1-3.
2. Defendant's waiver of service, p. 3.
3. Order appointing receiver, pp. 3-4.
4. Bond and oath of receiver, pp. 4-5.
5. Order for transfer of liability policy, p. 5.

In testimony whereof I have hereunto set my hand and the seal of said court at my office in Kaufman, Kaufman County, Texas this the 1<sup>st</sup> day of May, 1914.

[Seal] W. W. FRANKLIN,  
Clerk of District Court, Kaufman County, Texas.

The State of Texas,  
County of Kaufman.

I, F. L. Hawkins, Judge of the District Court of Kaufman County, Texas, do hereby certify that W. W. Franklin is the clerk of said court, and that his foregoing attestation is in due form.

Witness my hand this the 1st day of May, 1914.

F. L. HAWKINS,  
Judge of District Court, Kaufman County, Texas.

The State of Texas,  
County of Kaufman.

I, W. W. Franklin, clerk of the District Court of Kaufman County, Texas, do hereby certify that F. L. Hawkins is the Judge of said court and that his genuine signature is appended to the foregoing attestation.

Given under my hand and the seal of said court at

my office in Kaufman, Kaufman County, Texas, this the 1st day of May, 1914.

[Seal]

W. W. FRANKLIN,

Clerk of District Court of Kaufman County, Texas.”

[148—70]

“The next is the original *alias* execution issued but never executed.

“The COURT.—Well, I don’t think that that is very material.

“Mr. LOCKE.—I don’t either, but for whatever its effect may be as showing the history of the whole transaction I offer it.

“The next is a receipt from the Clerk of the District Court for \$160.40, for costs.

“The next is a draft made by the plaintiff—

“Mr. SCOTT.—We can dispose of that by an admission that we have not paid the judgment, although repeatedly asked to do so.

“Mr. LOCKE.—This is a draft for the amount which we are suing for, which was protested.

“We are ready to rest.

### **Motion for a Nonsuit.**

“Mr. SCOTT.—The defendant at this time desires to move your Honor for a nonsuit in this case upon the following grounds:

“That it appears from the evidence affirmatively that Mr. Davis was not authorized to sign an indemnity agreement or to secure a bond on behalf of this defendant, the Pacific Coast Casualty Company.

“That it affirmatively appears from the evidence that this lack of authority was brought to the notice of the General Bonding Company at the time the



bond was applied for by Mr. Davis and issued, on the ground that Mr. Davis was not the agent of the defendant, the Pacific Coast Casualty Company, in that transaction; on the further ground that the assignment or purported assignment of the policy of insurance to the General Bonding Company is invalid and void, that said policy of insurance was not assignable at that [149—71] time, that said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss has been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company.

“Upon the further ground that it appears affirmatively that the Elmo Rock Company was unable to pay the judgment and was insolvent. On the further ground that it appears affirmatively that the General Bonding Company and the Elmo Rock Company co-operated in an effort whereby the Elmo Rock Company did not pay and was not called upon to pay the judgment in the case of Sowders vs. The Elmo Rock Company. That said action taken at the instance of the Elmo Rock Company and with the co-operation of the plaintiff herein was designed specifically to deceive this defendant.”

If your Honor please, I desire briefly to state our views in reference to this case and to this motion—

The COURT.—I do not think I would expend much time in presenting it at this time; I should not be disposed to grant the motion without further consideration. The better way would be to submit it

and take a formal ruling and proceed with the case.

Mr. SCOTT.—We have no evidence to submit. We rest here.

The COURT.—You submit your cause then, Mr. Scott, on the motion for nonsuit?

Mr. SCOTT.—I do, your Honor.

Thereupon the cause was submitted on briefs to be filed, 20, 20 and 10 days; thereafter upon the filing of said briefs said motion for nonsuit was denied.

#### DEFENDANT'S EXCEPTION NO. 25.

Thereupon the Court rendered judgment in favor of the plaintiff. [150—72]

#### [Stipulation as to Bill of Exceptions.]

IT IS HEREBY STIPULATED by and between the parties hereto that the defendant has prepared and duly served upon the attorneys for the plaintiff herein within due time a proposed bill of exceptions; that the Judge of the above-entitled court duly designated a time and place as the time and place at which he would settle the said bill of exceptions; that both parties having been informed of the time for settling the bill of exceptions as designated by the Judge, the matter came on regularly for hearing for the purpose of settling the said bill of exceptions, and the attorneys for both parties were there present; that thereupon the form and contents of said bill of exceptions; that the foregoing engrossed bill of exceptions conforms to the truth, and is in proper form, and presented, settled and allowed within due time; that it contains all the evidence submitted in the above entitled action; that said bill is a true bill of exceptions, and the same may be approved, allowed and ordered

filed, and made a part of the record in said cause.

Dated December 15th, 1915.

LOCKE & LOCKE,

R. S. GRAY,

Attorneys for Plaintiff.

MYRICK & DEERING,

JAMES WALTER SCOTT,

Attorneys for Defendant. [151—73]

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*In the District Court of the United States, for the  
Northern District of California, Second Division.*

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Order Allowing, Settling and Certifying Bill of  
Exceptions.**

It appearing to the Court that the statements contained in the foregoing stipulation are, and that each of them is, true, and it further appearing to this Court that said bill of exceptions conforms to the truth, and is in proper form, and contains all the evidence on the trial of the above-entitled action, IT IS THEREFORE ORDERED that said bill is a true bill of exceptions, and the same is hereby approved, allowed and settled, and ordered filed, and made a part of the record of said cause.

Done in open court this 31st day of December,  
A. D. 1915.

(Sgd.)

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Dec. 31, 1915. Walter B. Mal-  
ing, Clerk. [152—74]

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*In the District Court of the United States, for the  
Northern District of California, Second Divi-  
sion.*

No. 15,723.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Petition for Writ of Error.**

Comes now the Pacific Coast Casualty Company, a corporation, defendant in the above-entitled action, and shows to the Court that on or about the 15th day of September, 1915, this Court entered judgment in said action in favor of the plaintiff and against this defendant, for the sum of Six Thousand One Hundred Sixty and 43/100ths (\$6,160.43) Dollars, and the costs of the action, and that in the judgment and the proceedings in said action prior thereto, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors and specifications of insufficiencies of the evidence to sustain the findings of the



Court, which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for a correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order be made fixing the amount [153] of a bond which will operate to supersede the said judgment.

MYRICK & DEERING,  
JAMES WALTER SCOTT,  
Attorneys for Defendant.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [154]

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*In the District Court of the United States, for the  
Northern District of California, Second Division.*

No. 15,723.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Assignment of Errors.**

Comes now the Pacific Coast Casualty Company, a corporation, defendant in the above-entitled action, and in connection with its petition for a writ of error herein makes the following assignment of errors on

which it will rely, and which it will urge on the prosecution of said writ of error in the above-entitled action, which errors occurred at the trial of said cause, to wit:

I.

The Court erred in this, in that it denied defendant's motion to compel plaintiff to elect between separate causes of action set up in the complaint. Said action and proceedings thereon were as follows:

Mr. SCOTT.—The defendant, if your Honor please, before the taking of the evidence begins, desires to move that the plaintiff be directed to elect between the three separate causes of action which, to our mind, are set up in the complaint, and to now state whether they are suing as assignee of the Elmo Rock Company by virtue of the assignment said to have been received by the receiver in a certain action in Texas, or whether they are proceeding on the theory that they, as surety, are subrogated [155] to certain rights of the Elmo Rock Company. All three matters are set forth in the complaint. We demurred.

The COURT.—The demurrer was overruled, was it not?

Mr. SCOTT.—Yes; we demurred on these same grounds.

The COURT.—Your motion will be denied. The complaint does not strike me as presenting a question of duplicity at all. The action is on the casualty bond, as I view it, under the subrogation of the present plaintiff to the rights of the Elmo Rock Company. The action proceeds upon the theory that this plain-

tiff, having under the compulsion of this supersedeas bond given on appeal in the action for personal injury paid the judgment, and thereafter having been under the authority of the Court given an assignment by the receiver of the Rock Company of that company's rights under this policy of indemnity, that they are now entitled to sue the present defendant for the right which otherwise had the rock company not gone into the hands of a receiver would be exerting itself. That is the theory of the action, as I understand it.

Mr. LOCKE.—That is the main theory. We do not discuss the existence and legal effect of this indemnity bond.

The COURT.—That is merely auxiliary.

Mr. LOCKE.—That is one of the circumstances, one of the inducements, merely.

The COURT.—That was the theory upon which the demurrer was overruled, and upon that theory I could not compel them to elect.

Mr. SCOTT.—We wish to make the motion in aid of the demurrer so as to exercise our point, and we take an exception.

The COURT.—Very well. [156]

(To said ruling of said Court the defendant thereupon duly excepted.)

## II.

The Court erred in overruling the defendant's objection to question propounded to witness Angus G. Wynne, with respect to steps taken by him after the judgment of the lower court was affirmed in the case of Sowders vs. Elmo Rock Company, as follows:

“Q. What steps did you take after filing of the mandate for the collection of the judgment?

Mr. SCOTT.—We object to that as calling for secondary evidence and not the best evidence.

The COURT.—The objection is overruled.”

(To which ruling the defendant took an exception.)

### III.

The Court erred in denying the defendant's motion to strike out the latter portion of the answer to the question referred to in the foregoing assignment of error upon the ground that said portion of said answer was hearsay. The following proceedings occurred:

“Q. What steps did you take after filing of the mandate for the collection of the judgment?

Mr. SCOTT.—We object to that as calling for secondary evidence and not the best evidence.

The COURT.—The objection is overruled.

A. I applied to the firm of Meador & Davis, at Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days.

Mr. SCOTT.—We move that the latter portion of the answer go out as hearsay. [157]

The COURT.—The motion is denied.”

(To which ruling the defendant took an exception.)

### IV.

The Court erred in denying the motion of defendant to strike out the following portion of the answer of witness Angus G. Wynne, viz: “Mr. Sowders and ourselves assigned together with the First State Bank at Terrell I believe, our interest in this judg-



ment to the General Bonding and Casualty Insurance Company.”

The proceedings in that regard were as follows:

WITNESS stated.—“I had taken the matter up with the General Bonding & Casualty Insurance Company and they had asked me to proceed against the Rock Company and I had *alias* execution issued and caused the same to be issued on the 9th day of October, 1913, against the Elmo Rock Company and the General Bonding & Casualty Insurance Company.

Q. To what county?

A. To Dallas county. That execution I presented in person to the General Bonding & Casualty Insurance Company, and they paid to Mr. Sowders and to myself the money, costs and interest called for in said *alias* execution. Mr. Sowders and ourselves assigned together with the First State Bank at Terrell, I believe, our interest in this judgment to the General Bonding & Casualty Insurance Company.

Mr. SCOTT.—We move that the latter part of the answer go out as immaterial, irrelevant and incompetent, and not within the issues of the case.

The COURT.—Oh, I don't think that does any harm. Proceed.

(To said ruling of said Court, defendant thereupon duly excepted.) [158]

## V.

The Court erred in overruling defendant's exception to the question propounded to witness C. M. Crumbaugh, that his testimony was not the best evidence. The proceedings in that respect were as follows:

“Q. Please state what you know about the proceedings connected with the payment of this judgment in so far as Elmo Rock Company and its Receiver were concerned.

Mr. SCOTT.—We object to that on the ground that the record is the best evidence.

The COURT.—The objection is overruled. It would not necessarily be the record.

A. After the judgment was rendered in the District Court the case was duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all of the property of the Elmo Rock Company, covering the land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three days before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a receivership, and had all of the property put in the hands of a Receiver and stopped the execution.”

(To said ruling of said Court, defendant thereupon duly excepted.)

## VI.

The Court erred in denying defendant's motion to strike [159] out certain portions of the foregoing answer which dealt with matters of record as not the best evidence, and to said ruling of said Court, the

defendant then and there duly excepted. The proceedings which occurred in this connection were as follows:

“Q. Please state what you know about the proceedings connected with the payment of this judgment in so far as Elmo Rock Company and its Receiver were concerned.

Mr. SCOTT.—We object to that on the ground that the record is the best evidence.

The COURT.—The objection is overruled. It would not necessarily be the record.

A. After the judgment was rendered in the District Court, the case was duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all the property of the Elmo Rock Company, covering the land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three days before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a Receivership and had all of the property put in the hands of a Receiver and stopped the execution.

Mr. SCOTT.—We move to strike out the portion of the answer which deals with matters of record, as not the best evidence.

The COURT.—These are matters that are entirely

within [160] the personal knowledge of an attorney; he is not stating the contents of a record at all. He is stating steps that were taken. Motion denied.”

(To said ruling of said Court, defendant took an exception.)

## VII.

The Court erred in overruling the defendant’s objection to the question propounded to said last-named witness by Mr. Locke, as follows:

“Q. In the conference that took place in the court between yourself and Mr. Cosnahan and Judge Hawkins, it was requested and understood by all the parties that the surety company was to pay this judgment in behalf of the Elmo Rock Company, because it was surety on the supersedeas bond, and that it desired the transfer of the policy in consideration of such payment?

Mr. SCOTT.—We object to that on the ground that it is not redirect examination, and further, that it is immaterial, irrelevant and incompetent; and more particularly, if your Honor please, upon this ground, that the assignment of this policy we claim cannot be the basis of an action against this defendant for the reason that the policy has never been performed—by the terms of the policy requiring payment by the assured—was never performed prior to the assignment that the assignee has never acted under the policy that the assignee of the policy made its payment a considerable time before the policy was assigned to it, and in making the payment was—so far as this defendant is concerned—purely a volunteer.



We therefore object to that evidence.

The COURT.—The objection is overruled.

A. Yes, sir, that was the understanding. [161]

(To which ruling of said Court defendant there-upon duly excepted.)

### VIII.

The Court erred in denying defendant's motion to strike out that portion of the answer of witness Leeds which refers to an indemnity bond obtained through Meador & Davis. In that connection the following proceedings occurred:

“Q. What, if anything, within your knowledge, was done with reference to the making of a super-sedeas bond in that case?

A. We had the bond made by the General Bonding & Casualty Company of Dallas after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys Meador & Davis.

Mr. SCOTT.—I move that the latter part of the answer go out, ‘after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis,’ Meador & Davis appears to be the name of a firm of attorneys at law who represent the defendant. There is no authority shown.

The COURT.—That authority can be shown by the acts of the parties.

Mr. SCOTT.—It has not been shown.

The COURT.—I say it may be shown by this very method. If it appears thereafter that no objection was ever taken to what they did in the matter, the jury has the right to infer authority. Objection

overruled. . . . Now, Mr. Scott, I see what your suggestion is as to the statement of the witness that they secured the indemnity from the Pacific Coast Casualty Company through Meador & Davis. [162]

Mr. SCOTT.—Yes, your Honor.

The COURT.—I would not regard that as proof of authority.

Mr. LOCKE.—We simply prove that to show the connection of the indemnity bond with the case.

The COURT.—Yes, motion denied.”

(To said ruling of said Court, defendant there-upon duly excepted.)

## IX.

The Court erred in denying defendant’s motion to strike out the answer of witness Leeds to the question propounded by Mr. Locke, said motion being made upon the ground that said answer was merely conjecture and not the best evidence. The proceedings in that connection were as follows:

“Q. Did you inform the Terrell people, your agents, or the Galveston agents, about the action that you had taken in reference to this bond?

A. I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed.

Mr. SCOTT.—That we move to go out as merely the conjecture of the witness, and not the best evidence.

Mr. LOCKE.—That is all that any memory can be.

Mr. SCOTT.—The best evidence would be the written instrument from Galveston, Texas, authorizing them. He said he would have to refer to the files to see. [163]

The COURT.—Well, this does not do any harm.

Mr. SCOTT.—It might qualify materially the question as to whether or not they were authorized to enter into dealings with reference to the bond.

The COURT.—The Court is bound to recognize at this day, when so very largely business is done when people are within reasonable proximity to each other through the telephone and over the telephone, that I do not think that the same strictness of rule would apply to evidence of that character. He may have had in his mind a conversation over the telephone. Motion denied.”

(To said ruling of said Court, defendant thereupon duly excepted.)

## X.

The Court erred in denying the defendant's motion to strike out the answer of witness John B. Stephenson to question propounded by Mr. Locke, upon the ground that said answer was incompetent and no proper foundation for the introduction of such evidence had been laid. In that connection the following proceedings occurred:

“Q. Please state as nearly as you can remember them, the negotiations that led up to the making of that bond. Give the history of the transaction.

Mr. SCOTT.—We desire to object on the ground that no proper foundation has been laid relative to

the transaction by Mr. Davis in that behalf. My objections may be anticipating the answer.

The COURT.—Yes, the question is entirely proper. The answer may develop something that you may object to.

A. Mr. Davis, of the firm of Meador & Davis, telephoned [164] us that he would like to have us execute the bond as surety, and he asked me if we would like to have us execute the bond as surety, and he asked me if he would be in the office and discuss the matter with him. On that day, or the next day—perhaps it was the next day—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond.

Mr. SCOTT.—We move that the answer go out as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casualty Company in the defense of this damage suit, and as such attorney at law I think the rule of law is well settled that he has no authority to bind his client in the matter of entering into an agreement for an appeal bond.

The COURT.—Well, you will find, Mr. Scott, that the strictness of that rule has become very much relaxed in the recent years when attorneys perform so many functions of a character more or less not strictly within the lines of the duties of attorneys



at law; they act as attorneys at law, and attorneys in fact combined, as attorneys at law and agents combined. I do not think I would be justified in striking that out. Of course it will not be admitted to the prejudice of any legitimate objection to its aspect as showing authority hereafter, but it is a circumstance which I think would bear upon the question of authority, and I would not be permitted to strike it out. [165]

Motion denied."

(To said ruling of said Court, defendant thereupon duly excepted.)

## XI.

The Court erred in overruling defendant's objection to question propounded to witness Stephenson on the ground that the same is immaterial, irrelevant and incompetent, that no proper foundation for the introduction of such evidence was laid, it not being shown that Davis was anything other than a representative of Pacific Coast Casualty Company, in the defense of the Sowders damage suit, and that as such attorney at law he had no authority to bind the defendant in the matter of an appeal bond. In this connection, the following proceedings occurred:

"Q. In whose behalf did Davis represent himself to be acting in applying to you for the execution of this supersedeas bond?

Mr. SCOTT.—We make the same objection to that, your Honor.

The COURT.—You understand you cannot prove an agency by the declarations of the agent.

Mr. LOCKE.—Of course not. It is simply one of the circumstances.

The COURT.—I think that it is admissible as a part of the transaction.

Mr. SCOTT.—If, your Honor, anyone properly authorized by this defendant were present or participated in this transaction then I concede it might be, but to bring in here circumstances of this kind without first laying a foundation showing that our properly [166] authorized representative was present—

Mr. LOCKE.—There can be authority by ratification.

The COURT.—I don't think that would be essential. The question is more as to the effect of the evidence rather than its admissibility. I will let it stand."

(To said ruling of said Court, defendant thereupon duly excepted.)

## XII.

The Court erred in overruling the defendant's objection to question propounded to witness Stephenson with reference to the usages and practices in Dallas, Texas, with respect to the procurement by attorneys at law of the execution by surety companies on appeal bonds for their clients. In this connection the following proceedings occurred.

"Q. That is the practice in that regard?

Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

The COURT.—I do not see the materiality of that.

Mr. LOCKE.—The proposition is this: For the authority of Davis to execute this bond *re* rely upon three things: First, original authority, under evidence that has not yet come in; and secondly, a holding out, under the customs of business there prevailing; and thirdly, a ratification by the use of this bond, even though originally unauthorized, paying for it, etc. This question is directed to the proposition of holding out, whether it was in accordance with the customs prevailing there.

The COURT.—We all know that, as a matter of common knowledge, that not only in Texas, but that generally attorneys [167] do those things: I don't think that would be admissible, that the usual custom and habit of attorneys in that respect would be admissible to show an agency in a particular instance.

Mr. LOCKE.—It might show a holding out.

Mr. SCOTT.—We have not created the custom.

The COURT.—I will sustain that objection.

Mr. LOCKE.—The plaintiff will except. Then he states what the custom is, and I suppose that will go out, also, your Honor.

The COURT.—Yes.

Mr. LOCKE.—Then I ask him a further question as to whether the usage he had described is the general usage obtaining with other insurance companies, and he said it was.

The COURT.—Well, I don't know about that; just read that testimony.

Mr. LOCKE.—I am reading the testimony so that your Honor will understand what it is. The first

question that was objected to was whether he was familiar with the usages and practices, and he said he was, and then he describes it, as follows; and then he answers as to the general usage.

Mr. SCOTT.—We make the same objection to that, that it is immaterial, irrelevant and incompetent, and not evidence which would bind this company.

The COURT.—I do not think this question goes to the matter of the specific authority of Davis to sign the indemnity agreement; that will have to be gathered from the whole case. I think, though, that this is perfectly competent to show what the usual method was of proceeding to procure such a bond as [168] that. That is all this witness is testifying to, in fact.

Mr. SCOTT.—I don't see how evidence of that character is very material in the case.

The COURT.—Mr. Scott, where it is sought to prove an ultimate fact from a general course of dealing, it may all be material; I will let it go in.

Mr. LOCKE.—That applies to the preliminary question, also, the whole examination.

The COURT.—Yes, I will withdraw the previous ruling and let it go in.

A. Such matters are usually taken up by us with the company's attorney. I don't believe I have ever executed one where the company took the matter up with us direct."

(After such ruling by said Court, defendant thereupon duly excepted.)



## XIII.

The Court erred in overruling the defendant's objection to a question propounded to witness Stephenson with respect to the practice of insurance companies in furnishing appeal bonds. In this connection the following proceedings occurred:

“Q. Please state whether the usage you have described as obtaining in the office of your own company is within your knowledge the general usage obtaining in the office of other insurance companies in this locality?

Mr. SCOTT.—Same objection, that it is immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

The COURT.—Objection overruled. [169]

A. So far as I have any knowledge, it is.”

(To such ruling of said Court, defendant thereupon duly excepted.)

## XIV.

The Court erred in overruling the defendant's objection to question propounded to witness Stephenson, as to what information he had at the time of executing the appeal bond concerning the nature and extent of the authority of Davis. In this connection the proceedings were as follows:

“Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the Pacific Coast Casualty Company in the matter of getting the supersedeas appeal bond.

Mr. SCOTT.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—That ought to be right in your line. If he has any authority he will state it. Let it go in.

A. We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond.

Mr. SCOTT.—We move that that go out as not responsive to the question. It does not state the information, it simply states his conclusion.

The COURT.—I will hear the balance of it, and see what it shows.”

(Thereupon defendant duly excepted.) [170]

XV.

The Court erred in overruling defendant's objection to question propounded to witness Stephenson with respect to the authority of Davis, as follows:

Q. Was the matter of his authority discussed between you?

In this connection the following proceedings occurred:

“Q. Was the matter of his authority discussed between you?

Mr. SCOTT.—Objected to as immaterial, irrelevant and incompetent, and no foundation laid.

The COURT.—The objection is overruled. If it should appear that thereafter the case took a course where the defendant here was bound to know, or it was called to its attention that such a contract had been executed on its behalf by attorney Davis and

they made no objection, or acted upon it as though he was authorized, that would be, in law, a ratification, and if they did not do any thing of the kind, then they cannot be bound by his mere declaration that he acted in certain relations.

A. Our general information was that the Pacific Coast Casualty Company had been represented by Meador & Davis, and that they had power of attorney to execute any paper for them. The exact amount of their power of attorney we did not know, and did not know what their limit was. We supposed they had full authority in this particular case, or in any other case. We had made other bonds for them, and they had never questioned their power of attorney.”

(To which ruling of said Court, defendant thereupon duly excepted.) [171]

#### XVI.

The Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's Exhibit "D" being the contract of indemnity signed by Davis, which was offered in evidence by the plaintiff. Upon said last mentioned document being so offered in evidence, the following proceedings occurred:

“Mr. SCOTT.—We object to the introduction of that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company.

The COURT.—I will let that go in subject to the objection.”

(After such ruling by said Court defendant there-upon duly excepted.)

The said Plaintiff's Exhibit "D" is in the words and figures following, to wit:

"The State of Texas,  
County of Dallas.

"Whereas, heretofore, to wit, on the — day of —, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrel, Texas, an employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy, and

"Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of \$5,000.00 in the District Court of Kaufman County, Texas; and, whereas, the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas a supersedeas bond of \$11,000.00 is required to perfect said appeal, and the General



Bonding & Casualty Insurance Company of Dallas, Texas, in consideration [172] of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now

“Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

“Witness its hand, this 6th day of August, 1912.

“PACIFIC COAST CASUALTY COMPANY.

By JOHN DAVIS,

Its Attorney at Law and in Fact.”

XVII.

The Court erred in overruling the defendant's objection to the introduction in evidence of assignment of insurance policy by Elmo Rock Company to plaintiff. Upon said last-named document being so offered in evidence, the following proceedings occurred:

“Mr. SCOTT.—I would like to make a formal objection to that on the ground that the policy, by the terms thereof, is not assignable, and on the ground that this assignment cannot be made the basis of a cause of action against this defendant for the reason

that no payments have been made by the assignees under the terms of this assignment or under the terms of the policy, but that the payment of the judgment by the assignee was a payment made prior to the assignment made on October 22, of this year, whereas the assignment was of November 4, 1913, and such payment is as to the Pacific Coast Casualty Company the payment of a volunteer; that the instrument is immaterial, irrelevant and incompetent as to the Pacific Coast Casualty Company; that furthermore, the assignment appears from the evidence of the plaintiff to have been made in pursuance of a scheme to enable [173] the assured by the assurance and the collusion of the General Bonding Company to avoid and escape its obligation under the policy to make the payment within a certain specified time after the judgment became final.

The COURT.—How is that?

Mr. SCOTT.—It seems that from the evidence as now disclosed in the case, that a stockholder of the assured company, in order to prevent the assured paying the judgment, as according to the terms of its policy it was required to do, threw it into some sort of a proceeding whereby it had a receiver appointed, *an* and is now holding its property in *statu quo*, allowing the bonding company to make the payment while it allows the receiver to preserve its property intact until this suit is disposed of.

The COURT.—There is not enough evidence to show collusion thus far; what you may show thereafter, I cannot tell.

Mr. LOCKE.—And there is no pleading of collusion.

The COURT.—No, there is no pleading of collusion. I will permit it to go in.

Mr. LOCKE.—This is a little out of order, but I might as well finish this document as long as I am at it.

(Continues reading.)

There is a copy of that attached to the pleadings.

The COURT.—What is the necessity of putting in these papers that are attached to the pleadings and that are not in any wise denied?

Mr. LOCKE.—As I understand the California proceedings, they are not denied; but there is a denial on information and [174] belief by which the defendant has undertaken to put on us the burden of proving these things.

The COURT.—There are a lot of denials in the answer that are not good under our practice.

Mr. SCOTT.—This is a foreign record, your Honor.

The COURT.—That does not make any difference. You cannot deny for want of knowledge. If you have a witness back there you would have to send for him or take his deposition. You have the same facilities for examining them.

Mr. LOCKE.—I construe the statute of California as your Honor construes it, but I prefer to take the safe side and put these things in.

The COURT.—Very well."

(To which ruling by said Court, the defendant thereupon duly excepted.)

XVIII.

The Court erred in denying defendant's Motion for a Nonsuit, which Motion was as follows:

"Mr. SCOTT.—The defendant as this time desires to move your Honor for a nonsuit in this case upon the following grounds:

That it appears from the evidence affirmatively that Mr. Davis was not authorized to sign an indemnity agreement or to secure a bond on behalf of this defendant, the Pacific Coast Casualty Company.

That is affirmatively appears from the evidence that this lack of authority was brought to the notice of the General Bonding Company at the time the bond was applied for by Mr. Davis and issued, on the ground that Mr. Davis was not the agent of the defendant, the Pacific Coast Casualty Company, in that transaction; [175] on the further ground that the assignment or purported assignment of the policy of insurance to the General Bonding Company is invalid and void, that said policy of insurance was not assignable at that time, that said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss, has never been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company.

Upon the further ground that it appears affirmatively that the Elmo Rock Company was unable to pay the judgment and was insolvent. On the further ground that it appears affirmatively that the General Bonding Company and the Elmo Rock Company



co-operated in an effort whereby the Elmo Rock Company did not pay and was not called upon to pay the judgment in the case of Sowders vs. The Elmo Rock Company. That said action taken at the instance of the Elmo Rock Company and with the co-operation of the plaintiff herein was designed specifically to deceive this defendant.”

(To said ruling of said Court, this defendant thereupon duly excepted.)

### XIX.

The Court erred in overruling and denying defendant's petition for a new trial in said action, to which ruling the defendant then and there duly excepted.

And defendant now specifies the particulars in which the evidence was insufficient to justify the decision of the Court, as follows:

#### I.

Under this, the first specification, defendant claims [176] that the evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company procured an indemnity bond from the defendant, through attorneys Meador & Davis; that the evidence shows that Meador & Davis were not the attorneys in fact of defendant and were not authorized to give an indemnity bond on behalf of the defendant.

#### II.

The evidence is and was insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company or Meador & Davis were authorized by J. B. Seinsheimer & Company to have an indemnity bond executed for the reason that the evidence shows that the defendant declined to au-

thorize either Miller-Stemmons Company or Meador & Davis to furnish an indemnity bond, and that the evidence further shows that J. F. Seinsheimer & Company were not authorized to issue indemnity bonds on behalf of the defendant casualty company.

III.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that as an inducement to the issuance of the supersedeas appeal bond, Davis gave to plaintiff an indemnity contract, set forth in said findings, for the reason that the evidence shows that said alleged indemnity contract was not given as an inducement to the issuance of said supersedeas bond, but was given by Davis subsequent to the issuance of said bond.

IV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that John Davis was the attorney in fact of the defendant, for the reason that [177] the evidence shows that said John Davis never had any authority other than that of an attorney at law, employed by defendant to defend Elmo Rock Company.

V.

The evidence was and is insufficient and there is no evidence to sustain the finding that Stephenson was not shown the defendant company's letter of June 28th, 1912, to its attorneys for the reason that the evidence shows that said letter was delivered to Stephenson by Davis at the time that Davis made application for the supersedeas bond and said letter was held by Stephenson until the taking of his deposition in this case.

## VI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson was not in any way made aware of any limitations upon the authority of Davis, for the reason that the evidence shows that Davis told Stephenson he had no authority to execute an indemnity contract, and said Davis delivered to said Stephenson at the time of executing the indemnity contract dated August 6th, 1912, the letter dated June 28th, 1912, from defendant, denying him authority to procure the supersedeas bond.

## VII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson dealt with Davis in the supposition that his authority was that which was usual in such cases, for the reason that the evidence does not show that Stephenson dealt with Davis under any misapprehension as to his authority, nor does the evidence show that it was usual for an attorney at law to have authority to [178] procure supersedeas bonds and execute indemnity contracts in their clients' names.

## VIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that authority to execute the indemnity contract was apparently possessed by Davis, for the reason that the evidence shows that Davis had no apparent authority to execute an indemnity contract on behalf of this defendant.

## IX.

The evidence was and is insufficient and there is no

evidence to sustain the finding of the Court that Leeds was an agent of this defendant, for the reason that the evidence shows that said Leeds was an insurance broker and acted in the premises without any authority from this defendant, and as an agent of plaintiff, if of either of the parties.

X.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that this defendant knew of the execution by John Davis of the indemnity contract dated August 6th, 1912, at any time prior to the commencement of the above-entitled action, for the reason that the evidence shows that John Davis executed said contract without authority from the defendant, and the evidence does not show that defendant even knew of the execution of the same.

XI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that defendant ratified the giving of said indemnity contract dated August 6th, [179] 1912, by John Davis, as attorney in fact of defendant, for the reason that the evidence shows that this defendant never knew of the making of said contract prior to the commencement of this action, and that this defendant paid the premium on the supersedeas bond merely as a part of the expenses arising from claims upon the assured, which expenses were embraced within the terms of the policy of Employer's Liability Insurance Number ME 36,696.

XII.

The evidence was and is insufficient and there is no



evidence to sustain the finding of the Court that plaintiff paid the judgment rendered against plaintiff and Elmo Rock Company at the special request of the Receiver of Elmo Rock Company, for the reason that the evidence shows that plaintiff paid said judgment after writ of execution duly issued and under compulsion of law.

### XIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the Receiver of Elmo Rock Company assigned to plaintiff the employer's liability policy issued by the defendant, for the reason that said policy was one insuring Elmo Rock Company against loss on account of bodily injuries suffered by its employee, and said policy was not assignable by Elmo Rock Company until loss had been sustained by said company.

### XIV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the property of Elmo Rock Company levied upon by the sheriff and held by the Receiver was worth Nineteen Thousand (\$19,000) Dollars. [180]

### XV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company was solvent and able to pay the judgment recovered by Sowders at the time execution was levied upon the property of said Elmo Rock Company, for the reason that the evidence shows that said Elmo Rock Company was insolvent at said time.

XVI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company sustained loss or expense in the action entitled "Sowders versus Elmo Rock Company," for the reason that the evidence shows that the Elmo Rock Company incurred no expense and suffered no loss in said action.

XVII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that loss or expense was actually sustained and paid in satisfaction of a final judgment by Elmo Rock Company within ninety days from the date of said judgment, and after trial of the issue, for the reason that the evidence shows that said Elmo Rock Company did not sustain and pay any loss or expense in satisfaction of any final judgment, and the evidence shows that no such loss or expense was paid within ninety days from the date of said judgment and after trial of the issue.

XVIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company were acting under J. F. Seinsheimer & Company of Galveston, Texas, defendant's general agents, for the reason that the evidence shows that Miller-Stemmons Company were merely [181] solicitors of insurance and that they were not the agents of defendant.

XIX.

The evidence is and was insufficient and there is no

evidence to sustain the finding of the Court that it was the duty of defendant to furnish the supersedeas bond in taking an appeal from the judgment in the action of Sowders versus Elmo Rock Company for the reason that the policy of insurance issued by defendant does not provide that defendant would furnish said bond and it does not require defendant to pay or to guarantee the payment of the judgment in an action for personal injuries until said judgment has become final and has been paid by the assured.

WHEREFORE the said PACIFIC COAST CASUALTY COMPANY, a corporation, defendant, prays that the said judgment of the District Court of the United States, for the Northern District of California, may be reversed.

MYRICK & DEERING,  
JAMES WALTER SCOTT,  
Attorneys for Defendant.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [182]

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*In the District Court of the United States, for the  
Northern District of California, Second Division.*

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Order Allowing Writ of Error and Fixing Amount of Bond.**

On this 28th day of October, 1915, came the defendant in the above-entitled action, Pacific Coast Casualty Company, a corporation, by its attorneys, and having filed in said action and presented to the undersigned its petition praying for the allowance of a writ of error, and having filed and presented with it an assignment of errors and specifications of certain insufficiencies of the evidence intended to be urged by it, praying that a transcript of the records, proceedings and papers on which the judgment in this action was rendered, duly authenticated, may be sent to the United States Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may appear proper in the premises,

Now, therefore, on consideration thereof, the Court does allow the writ of error upon the giving by the defendant of a bond in the sum of Twelve Thousand Six Hundred (\$12,600) Dollars, which said bond shall operate as a supersedeas bond.

WM. C. VAN FLEET,  
Judge of the United States District Court, for the  
Northern District of California, Second Division.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [183]



*In the District Court of the United States, for the  
Northern District of California, Second Division.*

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,

Defendant.

**Supersedeas Bond.**

KNOW ALL MEN BY THESE PRESENTS:

That we, Pacific Coast Casualty Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto General Bonding and Casualty Insurance Company, a corporation, in the penal sum of Twelve Thousand Six Hundred (\$12,600) Dollars, for the payment of which well and truly to be made we hereby jointly and severally bind ourselves and assigns firmly by these presents.

The condition of the foregoing obligation is such, that whereas the above-named principal sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, in the above-entitled action, to reverse the judgment heretofore rendered therein on the 15th day of September, 1915, and now desires to give bond and security as required by the order of the Court, to operate as a supersedeas and to stay the execution of the judgment in said action.

NOW THEREFORE, if the said Pacific Coast

Casualty Company, a corporation, shall prosecute its writ to effect and if it fails to make its plea good, shall answer all damages and costs, then this obligation to be void, otherwise to remain in full force and effect.  
[184]

IN WITNESS WHEREOF the parties hereto have caused their signatures to be hereunto attached this 28th day of October, 1915.

PACIFIC COAST CASUALTY COMPANY.

By T. L. MILLER,

President,

[Seal]

By ALLEN I. KITTLE,

Secretary.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

By H. V. D. JONES,

Attorney in Fact.

[Seal]

By B. F. CATOR,

Attorney in Fact.

Approved October —, 1915.

\_\_\_\_\_,  
District Judge.

Approved this 28th Oct. 1915.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [185]

*In the District Court of the United States, for the  
Northern District of California, Second Division.*

No. 15,723.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Order Approving Bond and Directing the Issuance  
of the Writ of Error.**

The defendant in the above-entitled action having this day presented its bond for a writ of error to operate as a supersedeas, with the United States Fidelity and Guaranty Company, a corporation, as surety, and the said bond having been approved by me and filed,

IT IS NOW ORDERED that the writ of error issue and that all proceedings on the said judgment in the said cause be stayed, pending the prosecution and hearing of the said writ of error.

Ordered and adjudged this 28th day of October, 1915.

WM. C. VAN FLEET,  
Judge of the District Court of the United States, for  
the Northern District of California, Second Division.

[Endorsed]: Filed Oct. 28, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk [186]

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 15,723.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY,  
Defendant.

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify that the foregoing one hundred eighty-six (186) pages, numbered from 1 to 186, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$125.40; that said amount was paid by Myrick & Deering, Esqrs., attorneys for defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District



Court, this 10th day of January, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled  
Jan. 10, 1916. J. A. S.] [187]

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**[Writ of Error (Original).]**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to  
the Honorable, the Judges of the District Court  
of the United States for the Northern District  
of California, Second Division. Greeting:

Because, in the record and proceedings, as also  
in the rendition of the judgment of a plea which is  
in the said District Court, before you, or some of  
you, between Pacific Coast Casualty Company, Plain-  
tiff in Error, and General Bonding and Casualty In-  
surance Company, a corporation, defendant in error,  
a manifest error hath happened, to the great damage  
of the said Pacific Coast Casualty Company, a cor-  
poration, plaintiff in error, as by its complaint ap-  
pears:

We, being willing that error, if any hath been,  
should be duly corrected, and full and speedy justice  
done to the parties aforesaid in this behalf, do com-  
mand you, if judgment be therein given, that then,  
under your seal, distinctly and openly, you send the  
record and proceedings aforesaid, with all things  
concerning the same, to the United States Circuit  
Court of Appeals for the Ninth Circuit, together with

this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 28th day of October, in the year of our Lord one thousand nine hundred and fifteen.

[Seal] WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,  
United States District Judge. [188]

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain

schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

Due service of the within Writ of Error, and receipt of a copy thereof, is hereby admitted this 29th day of October, 1915.

LOCKE & LOCKE,

R. S. GRAY,

Attorneys for Defendants in Error.

[Endorsed]: No. 15,723. United States District Court for the Northern District of California, Second Division. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding and Casualty Insurance Company, Defendant in Error. Writ of Error. Filed Nov. 3, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**Citation on Writ of Error (Original).**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to General Bonding and Casualty Insurance Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error

duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Pacific Coast Casualty Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 28th day of October, A. D. 1915.

WM. C. VAN FLEET,  
United States District Judge. [189]

Due service of the within Citation on Writ of Error, and receipt of a copy thereof, is hereby admitted this 29th day of October, 1915.

LOCKE & LOCKE,  
R. S. GRAY,  
Attorneys for Defendants in Error.

[Endorsed]: No. 15723. United States District Court for the Northern District of California, Second Division. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding and Casualty Insurance Company, Defendant in Error. Citation on Writ of Error. Filed Nov. 3, 1915. W. B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk.



[Endorsed]: No. 2735. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Casualty Company, a Corporation, Plaintiff in Error, vs. General Bonding and Casualty Insurance Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed January 14, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit,

By Meredith Sawyer,  
Deputy Clerk.

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

PACIFIC COAST CASUALTY COMPANY,  
Plaintiff in Error,

vs.

GENERAL BONDING & CASUALTY INSUR-  
ANCE COMPANY,  
Defendant in Error.

**Stipulation [and Order] Extending Time to  
[January 10, 1916 to] Prepare, Serve and File  
Transcript.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the parties hereto that in view of the  
delay necessitated in the preparation, settlement and  
allowance of the bill of exceptions in the above-en-  
titled matter, the time which plaintiff in error may

have within which to prepare, serve and file its transcript of record herein, and the time within which said cause shall be docketed, may be and the same is hereby extended to and including the 10th day of January, 1916.

Dated November 26, 1915.

MYRICK & DEERING,  
JAMES WALTER SCOTT,  
Attorneys for Plaintiff in Error.

R. S. GRAY,  
LOCKE & LOCKE,  
Attorneys for Defendant in Error.

Upon reading the foregoing stipulation IT IS SO ORDERED.

WM. W. MORROW.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding & Casualty Insurance Company, Defendant in Error. Order and Stipulation Extending Time to Prepare, Serve and File Transcript. Filed Nov. 27, 1915. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the Ninth Circuit.*

PACIFIC COAST CASUALTY COMPANY,  
Plaintiff in Error,

vs.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,  
Defendant in Error.

**Stipulation [and Order] Extending Time to  
[February 15, 1916, to] Prepare, Serve and File  
Transcript.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that in view of the delay necessitated in the preparation, settlement and allowance of the bill of exceptions in the above-entitled matter, the time within which plaintiff in error may have within which to prepare, serve and file its transcript of record herein, and the time within which said cause shall be docketed, may be and the same is hereby extended to and including the 15 day of February, 1916.

Dated January 8, 1916.

MYRICK & DEERING,  
JAMES WALTER SCOTT,  
Attorneys for Plaintiff in Error.

LOCKE & LOCKE,  
R. S. GRAY,  
Attorneys for Defendant in Error.

Upon reading the foregoing stipulation IT IS SO ORDERED.

WM. W. MORROW,  
U. S. Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Casualty Company, Plaintiff in Error, vs. General Bonding & Casualty Insurance Company, Defendant in Error. Order and Stipulation Extending Time to Prepare, Serve and File Transcript on Appeal. Filed Jan. 8, 1916. F. D. Monckton, Clerk.

No. 2735. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to February 15, 1916, to File Record Thereof and to Docket Case. Refiled Jan. 14, 1916. F. D. Monckton, Clerk.





No. 2735.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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PACIFIC CASUALTY COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

GENERAL BONDING AND CASUALTY IN-  
SURANCE COMPANY, a Corporation,  
Defendant in Error.

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**Brief of Plaintiff in Error.**

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MYRICK & DEERING,  
JAMES WALTER SCOTT,  
916 Nevada Bank Bldg.,  
Attorneys for Plaintiff in Error.

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Filed this.....day of May, 1916.

....., Clerk.

By.....Deputy Clerk.

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The James H. Barry Co.,  
San Francisco

Filed  
MAY 17 1916  
F. D. MONTGOMERY



No. 2735

IN THE

**United States Circuit Court of Appeals**

FOR THE

NINTH CIRCUIT

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PACIFIC COAST CASUALTY COMPANY, a  
corporation,

*Plaintiff in Error,*

vs.

GENERAL BONDING AND CASUALTY IN-  
SURANCE COMPANY, a corporation,

*Defendant in Error.*

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BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This case was brought to this Court on writ of error from the District Court of the United States, in and for the Northern District of California. The General Bonding and Casualty Insurance Company, plaintiff below and defendant in error herein, recovered a judgment in the sum of \$6,160.43 together with costs of suit. Both plaintiff and defendant in error are insurance companies. The defendant in error is a corporation incorporated under the laws of the State of Texas and it was on all pertinent dates en-



gaged as a surety company in giving bonds, especially supersedeas appeal bonds in Texas. The defendant below was a casualty insurance company and was at all the times referred to in the complaint, engaged in the business of issuing policies of employer's liability insurance in Texas and elsewhere.

On June 18th, 1911, plaintiff in error, the Pacific Coast Casualty Company, issued to Elmo Rock Company, a policy of employer's liability insurance, by which plaintiff in error insured Elmo Rock Company, a Texas corporation, for the term of one year ending June 18th, 1912, with a limit of \$5000.00 on account of an accident to one person, against loss and expense arising from claims upon said assured for damages on account of bodily injuries accidentally suffered, or alleged to have been suffered during the period of said policy. By its said policy, the plaintiff in error further agreed that if suit should be brought against said Elmo Rock Company on account of an accident, the Pacific Coast Casualty Company at its own expense would settle or defend such suit, whether groundless or not, and that the moneys expended in such defense should not be included in the limits of the liability fixed by said policy. The policy further provided that no action would lie for any loss or expense thereunder unless it was brought for loss or expense actually sustained and paid in satisfaction of a final judgment within 90 days from the date of said judgment and after trial of the issue (Record, pp.

13 to 19). The premium upon this policy was paid in due course by the assured.

In the year 1911, while said policy of insurance was in full force and effect, one J. B. Sowders, an employee of said Elmo Rock Company, accidentally suffered bodily injuries by reason of the prosecution of the work of quarrying and crushing rock done by said company and by himself as its employee. For the recovery of damages therefor, he instituted an action in the District Court of Kaufman County, Texas, against said assured. The plaintiff in error defended the action and took upon itself the entire management and control thereof, in accordance with the provisions of its policy. The trial of said action resulted in the rendition therein on June 19th, 1912, of a money judgment in favor of said J. B. Sowders, and against said Elmo Rock Company for the principal sum of \$5,000.00, with interest thereon at the rate of 6% per annum and all costs of suit. A copy of said judgment is set out as Exhibit B (Record, pp. 21 and 22).

Thereafter, one John Davis, a member of the firm of Messrs. Meador & Davis, attorneys-at-law at Dallas, Texas, who had been employed by plaintiff in error to defend said action on behalf of said Elmo Rock Company, gave notice to plaintiff in error that said judgment had been rendered (Record, pp. 140 and 141), and he was instructed by the plaintiff in error to proceed with the appeal of the case, but

was informed that the plaintiff in error would not furnish the supersedeas bond staying the execution (Record, p. 141). His order was "Kindly proceed with the appeal of this case, but you will understand that we do not furnish the supersedeas bond staying execution" (Record, p. 141). This telegram was sent Meador & Davis on June 28th, 1912.

Thereafter, Meador & Davis requested that the Elmo Rock Company furnish a supersedeas bond, which, under the Texas statute, was required to be furnished within 20 days after the rendition of a final judgment (Record, pp. 22 and 133). Elmo Rock Company refused to furnish said bond (Record, p. 142). Its refusal was communicated to plaintiff in error by Messrs. Meador & Davis, and on July 30th, 1912, Messrs. Meador & Davis were again informed by plaintiff in error that they should proceed with the appeal, but that the Elmo Rock Company must furnish its own supersedeas bond.

Meador & Davis were employed by plaintiff in error to represent the Elmo Rock Company, its assured. The firm did not represent plaintiff in error generally, but just represented it in specific cases that were placed in the hands of that firm (Record, p. 131). The extent of the authority conferred upon this firm was that it should defend the Elmo Rock Company in the case of J. B. Sowders vs. said Elmo Rock Company (Record, p. 133).

It was the uniform practice of the company to re-

quire the assured to furnish its own surety for a supersedeas bond (Record, p. 132). Despite this fact, on or about August 6th, 1912, John Davis, of the firm of Meador & Davis, requested defendant in error to furnish a supersedeas appeal bond in the case of *Sowders vs. Elmo Rock Company* (Record, pp. 121-122). According to the testimony of John B. Stephenson, President and General Manager of defendant in error, Mr. Davis telephoned to defendant in error on said August 6th, 1912, telling him that he would like to have defendant in error execute a bond as surety, and that he would call and discuss the matter with him. On that day, or the day following, Mr. Davis called upon Mr. Stephenson with the form of bond he wished executed. Defendant in error then telephoned a gentleman at Terrell and was advised by him that Elmo Rock Company was solvent (Record, pp. 122-123). The defendant in error also made some inquiries respecting the solvency of the Pacific Coast Casualty Company (Record, p. 123).

Thereafter, defendant in error executed the supersedeas bond (Record, p. 121), receiving from Mr. Davis an agreement of indemnity, being plaintiff's Exhibit D, (Record, pp. 150-151), which was signed "Pacific Coast Casualty Company, by John Davis, its attorney-at-law and in-fact." This agreement recited that whereas, a supersedeas bond was required on said appeal, and the defendant in error had agreed



to execute said bond as surety, therefore, in consideration of said agreement the plaintiff in error agreed and obligated and bound itself to indemnify the defendant in error against any loss, costs, charges, etc.

The record shows that John Davis was not attorney-in-fact for the plaintiff in error; nor was he attorney-at-law for plaintiff in error save that he was hired by plaintiff in error to defend the action brought against its assured, the Elmo Rock Company.

While the bond was furnished by defendant in error on or about August 6th, 1912, as above stated, the telegram to Meador & Davis, in which plaintiff in error declined to furnish supersedeas bond bore date June 28th, 1912, and the letter stating the assured must furnish its own bond bore date July 30th, 1912. The premium for this supersedeas bond was paid by plaintiff in error, as an expense incurred in connection with the case of *Sowers vs. Elmo Rock Company*, in settlement of its accounts with Miller-Stemmons Company (Record, p. 116). So far as the record discloses, the plaintiff in error was never informed by Meador & Davis, by the defendant in error, by Elmo Rock Company, or anyone else, that John Davis had either procured said supersedeas bond from the defendant in error, or had given to it an agreement of indemnity upon the issuance of said bond.

The judgment of the District Court of Kaufman County, Texas, from which the appeal was taken, was affirmed by the Court of Civil Appeals for the Fifth

Supreme Court Judicial District of Texas, March 15th, 1913. On June 27th, 1913, motion for a rehearing on an application for a writ of error was denied by the Supreme Court of the State of Texas. A copy of the final judgment of the Supreme Court was filed on July 5th, 1913, in the office of the Clerk of the Court of Civil Appeals. Thereafter, a writ of mandate was issued to the District Court of Kaufman County, and on August 10th, 1913, said mandate was duly filed with the Clerk of said Court. The judgment of the District Court thereupon became final in the sense that payment thereof was then enforceable.

Thereafter, on August 19th, 1913, a writ of execution was issued out of the said District Court of Kaufman County for the collection of said judgment, with interest and costs. On September 5th, 1913, the Sheriff levied execution upon the property of the Elmo Rock Company, and advertised said property for sale on October 7th, 1913. The Sheriff did not sell the property but under order of the District Court of Kaufman County, he turned over said property to W. D. Fletcher, as Receiver for the Elmo Rock Company, and the Sheriff made return of the writ of execution accordingly, showing that no property of defendant in error was found in said county.

Thereafter an alias writ of execution was issued out of said District Court of Kaufman County, commanding the Sheriff to make the required amount out of the property of defendant in error.

After execution was issued in the case of *Sowders vs. Elmo Rock Company* and levied on all of the property of the said Elmo Rock Company, the attorney of that Company placed all of its property in the hands of a receiver and stopped the execution (see Record, p. 101). The alias execution was directed against defendant in error, and under and by compulsion of that writ the defendant in error paid the judgment as surety on the supersedeas bond. The payment was made by the defendant in error without the execution of said alias writ (see Record, p. 183).

On October 22nd, 1913, defendant in error paid the principal sum of the judgment, together with interest. On October 25th, 1913, it paid court costs. After it had paid the principal sum of the judgment, together with interest and costs, the defendant in error obtained from the receiver of said Elmo Rock Company an assignment of whatever interest that Company had in its policy of liability insurance issued by the plaintiff in error. This assignment was dated November 4th, 1913.

Under this state of facts the General Bonding and Casualty Insurance Company, defendant in error, brought this action against the plaintiff in error to recover the sums of money expended by it as surety on the supersedeas bond.

## SPECIFICATION OF ERRORS.

We desire to specify the following errors which are relied upon, each of which is asserted in this brief, and intended to be urged:

## I.

The Court erred in denying defendant's motion to elect between the three separate causes of action set up in the amended complaint, to which plaintiff in error duly excepted, and exception was allowed. Proceedings in that respect were as follows:

"MR. SCOTT—The defendant, if your Honor please, before the taking of the evidence begins, desires to move that the plaintiff be directed to elect between the three separate causes of action which, to our mind, are set up in the complaint, and to now state whether they are suing as assignee of the Elmo Rock Company by virtue of the assignment said to have been received by the receiver in a certain action in Texas, or whether they are proceeding on the theory that they, as surety, are subrogated to certain rights of the Elmo Rock Company. All three matters are set forth in the complaint. We demurred.

"THE COURT—The demurrer was overruled, was it not?

"MR. SCOTT—Yes; we demurred on these same grounds.

"THE COURT—Your motion will be denied.

"MR. SCOTT—We wish to make the motion



in aid of the demurrer so as to exercise our point, and we take an exception.

"THE COURT—Very well.

"Defendant's Exception No. 1."

(See Record, pp. 88 and 89, Assignment of Error No. 1).

## II.

The Court erred in refusing to strike out the following testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

"Q. What steps did you take after filing of the mandate for the collection of the judgment?

"A. I applied to the firm of Meador & Davis, at Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days.

"MR. SCOTT—We move that the latter portion of the answer go out as hearsay.

"THE COURT—The motion is denied.

"Defendant's Exception No. 3."

(See Record, pp. 90 and 91, Assignment of Error No. III.)

### III.

The Court erred in allowing the following testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

"Q. Will you read your letter into the record?

"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent.

"THE COURT—The objection is overruled.

"Defendant's Exception No. 4.

"A. It is as follows: 'Kaufman, Texas, July 11th 1913, Meador & Davis, Dallas, Texas. Dear Sirs: In re Sowders vs. Elmo Rock Company. Our client is becoming very impatient about his money in the above case, and is punching us all the time. If you will rush the matter up we will appreciate it. Very truly, Wynne & Wynne, by Angus G. Wynne.' To which John Davis replied on the bottom of the same sheet of paper: 'Mr. Wynne: We are again to-day writing to our people to let the money come forward on this. What has become of the Elmo Rock Company business and property? Yours very truly, Meador & Davis, by John Davis.'

(See Record, pp. 91 and 92.)

### IV.

The Court erred in allowing the following testimony of Angus G. Wynne, to which plaintiff in error

duly excepted, and exception was allowed. Testimony was as follows:

"Q. Read that letter into the record.

"MR. SCOTT—We object to that on the ground that no proper foundation is shown. Mr. Davis is shown to be the attorney for the Elmo Rock Company. There is no proof that he is our attorney, or that he is authorized to bind us.

"THE COURT—So far as that is concerned, they may not be able to prove all the facts by one witness, but it is not at all [83—5] incompetent if they show that Davis was representing, in fact, the defendant here, rather than the nominal defendant in that action. If they fail to show that, them, of course, you can renew your objection. The objection is overruled.

"Defendant's Exception No. 5.

"A. It says: 'Dallas, Texas, July 21st, 1913. Messrs. Wynne & Wynne, Wills Point, Texas. Dear Sirs: Referring to the case of Sowders vs. Elmo Rock Company, beg to advise that we have just received a letter from the Pacific Coast Casualty Company, in which they say you must collect your judgment out of the Elmo Rock Company and that then they will deal with the Elmo Rock Company. We would suggest that you had better obtain execution, if necessary, at once and proceed with the matter, as our client has flatly refused to make payment of this judgment at this time. We are advising Messrs. Dashiell, Crumbaugh & Coon of this condition. Very truly yours, Meador & Davis, by John Davis.'"

(See Record, pp. 92 and 93).

## V.

The Court erred in refusing to strike out a portion of the testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed:

"A. Mr. Sowders and ourselves assigned together with the First State Bank at Terrell, I believe, our interest in this judgment to the General Bonding & Casualty Insurance Company.

"MR. SCOTT—We move that the latter part of the answer go out as immaterial, irrelevant and incompetent, and not within the issues of the case.

"THE COURT—Oh, I don't think that does any harm. Proceed.

"Defendant's Exception No. 6."

(See Record, pp. 93 and 94, Assignment of Error No. IV.)

## VI.

The Court erred in refusing to strike out a portion of the testimony of witness Angus G. Wynne, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Who paid the money?

"A. I think that the check was signed by the General Bonding & Casualty Insurance Company, and to them I think we transferred the judgment.

"MR. SCOTT—I move that the latter portion of the answer be stricken out as immaterial, irrele-



vant and incompetent, as to the transfer of the judgment.

"THE COURT—It is a part of the cross-examination.

"MR. SCOTT—That is true, your Honor, but not brought out in reply to our question 'Who paid the money?'

"THE COURT—The motion is denied.

"Defendant's Exception No. 7."

(See Record, pp. 97-98.)

## VII.

The Court erred in allowing the following testimony of witness C. M. Crumbaugh, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

"Q. Please state what you know about the proceedings connected [90—12] with the payment of this judgment in so far as Elmo Rock Company and its receiver were concerned.

"MR. SCOTT—We object to that on the ground that the record is the best evidence.

"THE COURT—The objection is overruled. It would not necessarily be the record.

"Defendant's Exception No. 9.

"A. After the judgment was rendered in the District Court, the case was duly appealed and finally a writ of error denied, I believe, by the Supreme Court, and execution was issued by the plaintiff in the case and levied on all of the property of the Elmo Rock Company, covering the

land and all the personal property. I did not discover that that execution had been issued until I noticed that it had been posted, and I think the land was to be sold—I think perhaps it was about only two or three days before the land was to be sold when I first discovered that the property had been seized, and in order to keep the assets of the corporation from being used for the purpose of paying off this indebtedness, I applied at once to the District Court for a receivership and had all of the property put in the hands of a receiver and stopped the execution.

“MR. SCOTT—We move to strike out the portion of the answer which deals with matters of record, as not the best evidence.

“THE COURT—These are matters that are entirely within the personal knowledge of an attorney; he is not stating the contents of a record at all. He is stating steps that were taken. Motion denied.

“Defendant’s Exception No. 10.” [91—13]

(See Record, pp. 100 to 102, Assignment of Error No. V.)

## VIII.

The Court erred in allowing the following testimony of C. M. Crumbaugh, to which plaintiff in error duly excepted, and exception was allowed. The testimony was as follows:

(By MR. LOCKE.)

“Q. In the conference that took place in the court between yourself and Mr. Cosnahan and Judge Hawkins, it was requested and understood

by all the parties that the surety company was to pay this judgment in behalf of the Elmo Rock Company, because it was surety on the supersedeas bond, and that it desired the transfer of the policy in consideration of such payment? [94—16]

“MR. SCOTT—We object to that on the ground that it is not redirect examination, and further, that it is immaterial, irrelevant and incompetent; and more particularly, if your Honor please, upon this ground, that the assignment of this policy we claim cannot be the basis of an action against this defendant for the reason that the policy has never been performed—by the terms of the policy requiring payment by the assured—was never performed prior to the assignment, that the assignee has never acted under the policy, that the assignee of the policy made its payment a considerable time before the policy was assigned to it, and in making the payment was—so far as this defendant is concerned—purely a volunteer. We therefore object to that evidence.

“THE COURT—The objection is overruled.

“Defendant’s Exception No. 11.

“A. Yes, sir, that was the understanding.”

(See Record, pp. 105-106, Assignment of Error No. VII.)

## IX.

The Court erred in allowing the following testimony of witness William L. Leeds, and refusing to strike out the same, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. What, if anything, within your knowledge, was done with reference to the making of a supersedeas appeal bond in that case?

"A. We had the bond made by the General Bonding & Casualty Company of Dallas after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis.

"MR. SCOTT—I move that the latter part of the answer go out, 'after securing an indemnity bond from the Pacific Coast Casualty Company through the Attorneys, Meador & Davis.' Meador & Davis appears to be the name of a firm of attorneys at law who represent the defendant. There is no authority shown.

"THE COURT—That authority can be shown by the acts of the parties.

"MR. SCOTT—It has not be shown.

"THE COURT—I say it may be shown by this very method. [103—25] If it appears thereafter that no objection was ever taken to what they did in the matter, the jury has the right to infer authority. Objection overruled. . . . Now, Mr. Scott, I see what your suggestion is as to the statement of the witness that they secured the indemnity from the Pacific Coast Casualty Company through Meador & Davis.

"MR. SCOTT—Yes, your Honor.

"THE COURT—I would not regard that as proof of authority.

"MR. LOCKE—We simply prove that to show the connection of the indemnity bond with the case.

"THE COURT—Yes. Motion denied.

"Defendant's Exception No. 13."

(See Record, pp. 115-116, Assignment of Error No. VIII.)



## X.

The Court erred in allowing and refusing to strike out the following testimony of William L. Leeds, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Did you inform the Terrell people, your agents, or the Galveston agents, about the action that you had taken in reference to this bond?

"A. I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed.

"MR. SCOTT—That we move to go out as merely the conjecture of the witness, and not the best evidence.

"THE COURT—Motion denied.

"Defendant's Exception No. 14."

(See Record, pp. 119-120, Assignment of Error No. IX.)

## XI.

The Court erred in refusing to strike out certain testimony of witness John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state as nearly as you can remember [108—30] them, the negotiations that led up to the

making of that bond. Give the history of the transaction.

"MR. SCOTT—We desire to object on the ground that no proper foundation has been laid relative to the transaction by Mr. Davis in that behalf. My objection may be anticipating the answer.

"THE COURT—Yes, the question is entirely proper. The answer may develop something that you may object to.

"Defendant's Exception No. 15.

"A. Mr. Davis, of the firm of Meador & Davis, telephoned us that he would like to have us execute the bond as surety, and he asked me if we would be in the office and discuss the matter with him. On that day, or the next day—perhaps it was the next day,—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond.

"MR. SCOTT—We move that the answer go out as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casualty Company in the defense of this damage suit, and as such attorney at law I think the rule of law is well settled that he has no authority to bind his client in the matter of entering into an agreement for an appeal bond.

"THE COURT—Motion denied. [109—31]

"Defendant's Exception No. 16."

(See Record, pp. 121-122, Assignment of Error No. X.)

## XII.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. In whose behalf did Davis represent himself to be acting in applying to you for the execution of this supersedeas bond?

"MR. SCOTT—We make the same objection to that, your Honor.

"THE COURT—You understand you cannot prove an agency by the declarations of the agent.

"MR. LOCKE—Of course not. It is simply one of the circumstances.

"THE COURT—I think that it is admissible as a part of the transaction. I will let it stand.

"Defendant's Exception No. 17.

"A. In behalf of the Pacific Coast Casualty Company." [110—32]

(See Record, p. 123, Assignment of Error No. XI.)

## XIII.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Are you familiar with the usages and practices at Dallas, and in the State of Texas,

with regard to the procurement by attorneys at law of the execution by surety companies of appeal bonds for their clients?

"A. Yes, sir.

"Q. What is the practice in that regard?

"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

"THE COURT—Let it go in.

"Defendant's Exception No. 18.

"A. Such matters are usually taken up by us with the company's attorney. I don't believe I have ever executed one where the company took the matter up with us direct."

(See Record, pp. 123-124, Assignment of Error No. XII.)

#### XIV.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state whether the usage you have described as obtaining in the office of your own company is within your knowledge the general usage obtaining in the office of other insurance companies in this locality?

"MR. SCOTT—Same objections, that it is immaterial, irrelevant and incompetent, not binding upon the defendant in any manner.

"THE COURT—Objection overruled.



"Defendant's Exception No. 19.

"A. So far as I have any knowledge, it is."

(See Record, p. 124, Assignment of Error No. XIII.)

## XV.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the [111—33] Pacific Coast Casualty Company in the matter of getting a supersedeas appeal bond.

"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent.

"THE COURT—Let it go in.

"A. We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond.

"MR. SCOTT—We move that that go out as not responsive to the question. It does not state the information, it simply states his conclusion.

"THE COURT—I will hear the balance of it and see what it shows.

"Defendant's Exception No. 21.

(See Record, pp. 124-125, Assignment of Error No. XIV.)

## XVI.

The Court erred in refusing to strike out a portion of testimony of witness John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Was the matter of his authority discussed between you?

"MR. SCOTT—Objected to as immaterial, irrelevant and incompetent, and no foundation laid.

"THE COURT—The objection is overruled. If it should appear that thereafter the case took a course where the defendant here was bound to know, or it was called to its attention that such a contract had been executed on its behalf by Attorney Davis and they made no objection, or acted upon it as though he [112—34] was authorized, that would be, in law, a ratification, and if they did not do anything of the kind, then they cannot be bound by his mere declaration that he acted in certain relations.

"Defendant's Exception No. 22.

"A. Our general information was that the Pacific Coast Casualty Company had been represented by Meador & Davis, and that they had power of attorney to execute any paper for them. The exact amount of their power of attorney we did not know, and did not know what their limit was. We supposed they had full authority in this particular case, or in any other case. We had made other bonds for them, and they had never questioned their power of attorney."

(Record, pp. 125-126, Assignment of Error XV.)

## XVII.

The Court erred in allowing the following testimony of John B. Stephenson, to which plaintiff in error duly excepted, and exception was allowed. Testimony was as follows:

"Q. Please state what, if any, information you had at the time of executing this appeal bond concerning the extent and nature of the authority of Mr. Davis to represent the [111—33] Pacific Coast Casualty Company in the matter of getting a supersedeas appeal bond.

"MR. SCOTT—We object to that as immaterial, irrelevant and incompetent.

"THE COURT—Let it go in.

"Defendant's Exception No. 20.

"A. We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond."

(Record, pp. 124, 125.)

## XVIII.

The Court erred in admitting in evidence copy of the contract of indemnity referred to as plaintiff's exhibit "D," to which plaintiff in error duly excepted, and exception was allowed. The proceedings in that respect were as follows:

"Thereupon plaintiff offered in evidence the contract of indemnity heretofore referred to in said depositions as Plaintiff's Exhibit 'D.'

"MR. SCOTT—We object to the introduction of

that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company.

"THE COURT—I will let that go in subject to the objection.

"Defendant's Exception No. 23.

"The said Plaintiff's Exhibit 'D' is in words and figures following, to wit:

" 'The State of Texas,

" 'County of Dallas.

" 'Whereas, heretofore, to wit, on the ——— day of ———, the Pacific Coast Casualty Company of San Francisco, California, issued to the Elmo Rock Company of Terrell, Texas, an employer's liability policy, insuring said rock company against loss and expense arising from claims upon the assured for damages on account of bodily injuries suffered or alleged to have been suffered during the period of said policy by any employee of the assured by reason of the prosecution of the work described in said policy; and,

" 'Whereas, during the period of said policy, one of the employees of said assured, to wit, J. B. Sowders, was injured by reason of the prosecution of the work described in said policy; and, whereas the said J. B. Sowders brought suit against said rock company and recovered a judgment of \$5,000.00 in the District Court of Kaufman County, Texas; and, whereas the said Pacific Coast Casualty Company believes that said judgment is erroneous and that no liability exists by reason of said injury sustained by said Sowders, and has employed John Davis, an attorney at law, Dallas, Texas, to perfect an appeal from said judgment and prosecute the same to effect; and, whereas [130—52] a supersedeas bond



of \$11,000.00 is required to perfect said appeal, and the General Bonding & Casualty Insurance Company of Dallas, Texas, in consideration of this agreement and other considerations, has agreed to execute said supersedeas bond as surety; Now,

“‘Therefore, in consideration of said agreement and other good and valuable considerations, the said Pacific Coast Casualty Company does hereby agree and obligate and bind itself to indemnify, and keep indemnified, the said General Bonding & Casualty Insurance Company against any and all loss, costs, charges, counsel fees, damages and expenses whatever, which said bonding company shall or may sustain or be put to at any time by reason or in consequence of having executed said supersedeas bond as surety.

“‘Witness its hand, this 6th day of August, 1912.

“‘PACIFIC COAST CASUALTY COMPANY,

“‘By JOHN DAVIS,

“‘Its Attorney at Law and in Fact.’”

(Record, pp. 149 to 151, Assignment of Error No. XVI.)

## XIX.

The Court erred in allowing in evidence the alleged assignment of the insurance policy to which plaintiff in error duly excepted, and exception was allowed. The proceedings in that respect were as follows:

Thereupon Mr. Locke offered in evidence the assignment of the policy.

“MR. SCOTT—I would like to make a formal objection to that on the ground that the policy, by

the terms thereof, is not assignable, and on the ground that this assignment cannot be made the basis of a cause of action against this defendant for the reason that no payments have been made by the assignees under the terms of this assignment or under the terms of the policy, but that the payment of the judgment by the assignee was a payment made prior to the assignment made on October 22 of this year, whereas the assignment was of November 4, 1913, and such payment is as to the Pacific Coast Casualty Company the payment of a volunteer; that the instrument is immaterial, irrelevant and incompetent as to the Pacific Coast Casualty Company; that furthermore, the assignment appears from the evidence of the plaintiff to have been made in pursuance of a scheme to enable the assured by the assurance and the collusion of the General Bonding Company to avoid and escape its obligation under the policy to make the payment within a certain specified time after the judgment became final. [131—53]

“THE COURT—How is that?

“MR. SCOTT—It seems that from the evidence as now disclosed in the case, that a stockholder of the assured company, in order to prevent the assured paying the judgment, as according to the terms of its policy it was required to do, threw it into some sort of a proceeding whereby it had a receiver appointed and is now holding its property in *statu quo*, allowing the bonding company to make the payment while it allows the receiver to preserve its property intact until this suit is disposed of.

“THE COURT—There is not enough evidence to show collusion thus far; what you may show hereafter, I cannot tell.

“MR. LOCKE—And there is no pleading of collusion.

"THE COURT—No, there is no pleading of collusion. I will permit it to go in.

"Said assignment was thereupon introduced in evidence. The assignment is set forth as exhibit 'J,' attached to plaintiff's complaint, and reference is hereby made to said exhibit, and the same is hereby made a part hereof.

"Defendant's exception No. 24."

(Record, pp. 151 to 153, Assignment of Error No. XVI.)

## XX.

The Court erred in denying the motion of plaintiff in error, made after defendant in error rested its case, for nonsuit, which motion was as follows:

### MOTION FOR A NONSUIT

"MR. SCOTT—The defendant at this time desires to move your Honor for a nonsuit in this case upon the following grounds:

"That it appears from the evidence affirmatively that Mr. Davis was not authorized to sign an indemnity agreement or to secure a bond on behalf of this defendant, the Pacific Coast Casualty Company.

"That it affirmatively appears from the evidence that this lack of authority was brought to the notice of the General Bonding Company at the time the bond was applied for by Mr. Davis and issued, on the ground that Mr. Davis was not the agent of the defendant, the Pacific Coast Casualty Company, in that transaction; on the further ground that the assignment or purported assignment of the policy of insurance to the Gen-

eral Bonding Company is invalid and void, that said policy of insurance was not assignable at that [149—71] time, that said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss has been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company.

“Upon the further ground that it appears affirmatively that the Elmo Rock Company was unable to pay the judgment and was insolvent. On the further ground that it appears affirmatively that the General Bonding Company and the Elmo Rock Company co-operated in an effort whereby the Elmo Rock Company did not pay and was not called upon to pay the judgment in the case of Sowders vs. The Elmo Rock Company. That said action taken at the instance of the Elmo Rock Company and with the co-operation of the plaintiff herein was designed specifically to deceive this defendant.

“If your Honor please, I desire briefly to state our views in reference to this case and to this motion——

“THE COURT—I do not think I would expend much time in presenting it at this time; I should not be disposed to grant the motion without further consideration. The better way would be to submit it and take a formal ruling and proceed with the case.

“MR. SCOTT—We have no evidence to submit. We rest here.

“THE COURT—You submit your cause then, Mr. Scott, on the motion for nonsuit?

“MR. SCOTT—I do, your Honor.

“Thereupon the cause was submitted on briefs to be filed, 20, 20 and 10 days; thereafter upon the



filing of said briefs said motion for nonsuit was denied.

"Defendant's exception No. 25."

(Record, pp. 183-185, Assignment of Error No. 211.)

The plaintiff in error now specifies the particulars in which the evidence was and is insufficient to justify the decision of the Court, as follows:

### I.

Under this, the first specification, defendant claims [176] that the evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company procured an indemnity bond from the defendant, through attorneys Meador & Davis; that the evidence shows that Meador & Davis were not the attorneys in fact of defendant and were not authorized to give an indemnity bond on behalf of the defendant.

### II.

The evidence is and was insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company or Meador & Davis were authorized by J. B. Seinsheimer & Company to have an indemnity bond executed for the reason that the evidence shows that the defendant declined to authorize either Miller-Stemmons Company or Meador & Davis to furnish an indemnity bond, and that the

evidence further shows that J. F. Seinsheimer & Company were not authorized to issue indemnity bonds on behalf of the defendant casualty company.

### III.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that as an inducement to the issuance of the supersedeas appeal bond, Davis gave to plaintiff an indemnity contract, set forth in said findings, for the reason that the evidence shows that said alleged indemnity contract was not given as an inducement to the issuance of said supesedeas bond, but was given by Davis subsequent to the issuance of said bond.

### IV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that John Davis was the attorney in fact of the defendant, for the reason that [177] the evidence shows that said John Davis never had any authority other than that of an attorney at law, employed by defendant to defend Elmo Rock Company.

### V.

The evidence was and is insufficient and there is no evidence to sustain the finding that Stephenson was not shown the defendant company's letter of June 28th, 1912, to its attorneys for the reason that the

evidence shows that said letter was delivered to Stephenson by Davis at the time that Davis made application for the supersedeas bond and said letter was held by Stephenson until the taking of his deposition in this case.

## VI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson was not in any way made aware of any limitations upon the authority of Davis, for the reason that the evidence shows that Davis told Stephenson he had no authority to execute an indemnity contract, and said Davis delivered to said Stephenson at the time of executing the indemnity contract dated August 6th, 1912, the letter dated June 28th, 1912, from defendant, denying him authority to procure the supersedeas bond.

## VII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Stephenson dealt with Davis in the supposition that his authority was that which was usual in such cases, for the reason that the evidence does not show that Stephenson dealt with Davis under any misapprehension as to his authority, nor does the evidence show that it was usual for an attorney at law to have authority to [178] procure supersedeas bonds and execute indemnity contracts in their clients' names.

## VIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that authority to execute the indemnity contract was apparently possessed by Davis, for the reason that the evidence shows that Davis had no apparent authority to execute an indemnity contract on behalf of this defendant.

## IX.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Leeds was an agent of this defendant, for the reason that the evidence shows that said Leeds was an insurance broker and acted in the premises without any authority from this defendant, and as an agent of plaintiff, if of either of the parties.

## X.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that this defendant knew of the execution by John Davis of the indemnity contract dated August 6th, 1912, at any time prior to the commencement of the above-entitled action, for the reason that the evidence shows that John Davis executed said contract without authority from the defendant, and the evidence does not show that defendant even knew of the execution of the same.



## XI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that defendant ratified the giving of said indemnity contract dated August 6th, [179] 1912, by John Davis, as attorney in fact of defendant, for the reason that the evidence shows that this defendant never knew of the making of said contract prior to the commencement of this action, and that this defendant paid the premium on the supersedeas bond merely as a part of the expenses arising from claims upon the assured, which expenses were embraced within the terms of the policy of Employer's Liability Insurance Number ME 36,696.

## XII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that plaintiff paid the judgment rendered against plaintiff and Elmo Rock Company at the special request of the Receiver of Elmo Rock Company, for the reason that the evidence shows that plaintiff paid said judgment after writ of execution duly issued and under compulsion of law.

## XIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the Receiver of Elmo Rock Company assigned to

plaintiff the employer's liability policy issued by the defendant, for the reason that said policy was one insuring Elmo Rock Company against loss on account of bodily injuries suffered by its employee, and said policy was not assignable by Elmo Rock Company until loss had been sustained by said company.

#### XIV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that the property of Elmo Rock Company levied upon by the sheriff and held by the Receiver was worth Nineteen Thousand (\$19,000) Dollars [180].

#### XV.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company was solvent and able to pay the judgment recovered by Sowders at the time execution was levied upon the property of said Elmo Rock Company, for the reason that the evidence shows that said Elmo Rock Company was insolvent at said time.

#### XVI.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Elmo Rock Company sustained loss or expense in the action entitled "Sowders versus Elmo Rock Company," for the reason that the evidence shows that

the Elmo Rock Company incurred no expense and suffered no loss in said action.

## XVII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that loss or expense was actually sustained and paid in satisfaction of a final judgment by Elmo Rock Company within ninety days from the date of said judgment, and after trial of the issue, for the reason that the evidence shows that said Elmo Rock Company did not sustain and pay any loss or expense in satisfaction of any final judgment, and the evidence shows that no such loss or expense was paid within ninety days from the date of said judgment and after trial of the issue.

## XVIII.

The evidence was and is insufficient and there is no evidence to sustain the finding of the Court that Miller-Stemmons Company were acting under J. F. Seinsheimer & Company of Galveston, Texas, defendant's general agents, for the reason that the evidence shows that Miller-Stemmons Company were merely [181] solicitors of insurance and that they were not the agents of defendant.

## XIX.

The evidence is and was insufficient and there is no evidence to sustain the finding of the Court that it was the duty of defendant to furnish the supersedeas bond in taking an appeal from the judgment in the action of Sowders versus Elmo Rock Company for the reason that the policy of insurance issued by defendant does not provide that defendant would furnish said bond and it does not require defendant to pay or to guarantee the payment of the judgment in an action for personal injuries until said judgment has become final and has been paid by the assured.

## ARGUMENT.

The questions of law suggested by this record are few in number and may be very briefly stated.

In its complaint plaintiff below sought to recover from the Pacific Coast Casualty Company the amounts it had expended by reason of giving the supersedeas bond on appeal and it based its hope of recovery apparently upon three different theories.

First: That it had paid and discharged judgment rendered in favor of Sowders and against the Elmo Rock Company, a corporation, and that in making such payment it took an assignment from Sowders of all right of action which he had as judgment creditor against the Elmo Rock Company.



It will be noted, however, that the defendant in error did not pay and discharge the judgment rendered in favor of Sowders against the Elmo Rock Company, but it took an assignment of the rights of Sowders against the Elmo Rock Company (Record, pp. 112, 113).

The judgment was not paid and discharged, as a matter of fact; but it was purchased by the defendant in error, and is now held as a live and subsisting claim against the Elmo Rock Company. This is confirmed by the assignment from the Elmo Rock Company to the General Bonding & Casualty Insurance Company, as will be noted from reading "Exhibit J" on pages 34 to 37 of the Record; which Exhibit recites that the General Bonding Company, by reason of its payment, has become subrogated to the rights of the Elmo Rock Company, and further recites that the assignment of the policy hereinafter referred to is made without prejudice to any right which said General Bonding & Casualty Insurance Company may have against the Elmo Rock Company for its reimbursement, otherwise than by means of said policy, for the amount expended by it in the payment of said judgment, interest and costs (Record, pp. 34 and 36). The assignment of the judgment recovered by Sowders was signed by himself and the First State Bank of Terrell and Wynne & Wynne.

Second: That Davis was the agent of the plaintiff in error or was held out as the agent of the plaintiff

in error, and that as such agent an indemnity agreement was signed by him, upon which plaintiff in error should be held liable.

The third theory is that plaintiff is an assignee of a policy of insurance issued by plaintiff in error to the Elmo Rock Company, and that as such assignee, having paid the loss, it is entitled to recover.

On the first theory, namely, that the defendant in error is subrogated to the rights, if any, which Sowders may have against the Elmo Rock Company and, therefore, may recover from the plaintiff in error, we respectfully submit that the defendant in error should have been nonsuited in the Court below.

The only right that Sowders had against the Elmo Rock Company was to have a writ of execution issue against the Elmo Rock Company and to see that the same was satisfied from its assets. These rights were neither increased nor diminished by an assignment of the judgment recovered by Sowders.

Where a surety has discharged the obligation of its principal, it is subrogated to the rights of the creditor who may have a judgment against the principal. Its rights are neither greater nor less than those of the creditor.

If the surety has paid the judgment which has been rendered against the principal, such surety may proceed to take out execution under such judgment and pay the same. The surety would succeed to

any rights which the creditor may have against the principal.

If collateral has been pledged or if the creditor has the same under attachment or under levy of execution, the surety may take the same for his protection. He is, as it were, put in the shoes of the creditor.

The creditor in this instance was Sowders, the injured employee who recovered a judgment against the Elmo Rock Company. Unquestionably the plaintiff herein would have a right to enforce the judgment obtained by Sowders against the Elmo Rock Company. The authorities are uniform, however, to the effect that under such a policy as the one in question in this case, the injured employee could not recover directly from this plaintiff in error upon the policy of insurance issued by it; and, therefore, it must logically follow that a surety discharging the judgment and merely subrogated to the rights of the plaintiff in the original action for personal injuries, is in the same situation as such plaintiff, is subrogated to his rights, and could not recover directly upon the policy of insurance any more than the plaintiff in the original action could have done.

For the general doctrine of subrogation we beg leave to refer to Brandt on Suretyship and Guaranty, Volume 1, beginning at Section 324. An examination of the text of this learned author and the authorities cited therein shows that the General Bonding &

Casualty Insurance Company, as surety, while it succeeded to all the rights of Sowders, the judgment creditor, did not, as such surety, succeed to any inchoate rights, if any, that the Elmo Rock Company might have had against this defendant.

The policy issued by this Company provided that the Pacific Coast Casualty Company would indemnify the Elmo Rock Company against loss sustained and paid by said Company in the Sowders case; yet it affirmatively appears from the record that the Elmo Rock Company never did sustain any loss whatsoever and never did pay any loss.

A judgment was rendered against the Elmo Rock Company, but by resort to receivership the Elmo Rock Company escaped the necessity of paying that judgment and the defendant in error was called upon to pay, and finally did pay, the judgment with interest and costs by reason of the fact that it had issued a supersedeas bond.

The Elmo Rock Company still evades the payment of said judgment. Therefore, the very contingency upon which payment by plaintiff in error was predicated has not yet occurred, the plaintiff in error's agreement being to pay when the Elmo Rock Company, its assured, had paid, and said assured having made no payment, the plaintiff in error is not to date called upon to make such payment.

The matter may be illustrated as follows: A being a man of some means goes to B and says to him,



"If you will give your note to a certain bank and borrow five thousand dollars thereon I will guarantee to repay to you (B) any loss that you may sustain upon that note." B, the maker of the note, then goes to C and asks C, for a valuable consideration, to become surety thereon. C does so. Thereafter, the note having become due and the bank suing thereon, the surety, by reason of the insolvency of B, is obliged to pay the note. B, the maker of the note, has naturally suffered no loss. C, the surety upon the note, has incurred a loss and paid the same. Manifestly, C cannot look to A for reimbursement, as A's contract was simply to repay to B any sums of money that B had expended, and B has expended none. Under the doctrine of subrogation the surety, C, having paid the loss, might look to B for reimbursement, but until B had actually paid the note or a portion thereof, neither he nor the surety could look to A, the original indemnitor, there being no privity of contract between the parties and the contract between A and B being one based upon a condition which is not yet fulfilled, and he cannot be held liable.

Any rights to which plaintiff below may have become subrogated upon the payment by it of the Sowders judgment were such rights as Sowders had against the Elmo Rock Company. They were not the rights which the Elmo Rock Company might

have had against this plaintiff in error, had the said Elmo Rock Company itself paid the loss.

This brings us to what we believe is the chief point in this case, namely, that no right of action has ever arisen against defendant under the policy of insurance issued by it for the reason that the assured has never sustained a loss.

An inspection of the policy, a copy of which is set forth in the complaint herein, shows that it insured the Elmo Rock Company against loss and expense sustained and paid. Such a policy is under the authorities merely an agreement to indemnify the specified person or corporation named as the assured. Liability arises under such policy only when the assured has suffered. Among the cases on this subject are the following:

*O'Connell vs. New York, N. H. and H. R. R. Co.*, 187 Mass., 272, 72 N. E., 979,

which holds that the payment of the judgment by the policy holder is a condition precedent to the liability of the Company, the Court saying:

"If, therefore, we assume, in favor of the plaintiff, without making a decision to that effect, that, after the defendant surety company had taken on itself the defense of the action, it was precluded from afterwards taking the position that the case was not one covered by the policy, *still the plaintiff has not made out a case here, because he has not paid the judgment entered in the action defended by the surety company.* There is nothing in the

finding of the Court which amounts to a waiver of this condition precedent to the defendant surety company's liability. To create a waiver, there must be some act inconsistent with the rights waived. There is nothing found here, or in the evidence on which that finding was made, inconsistent with a determination from the beginning on the part of the surety company to insist that, when the time came for payment under the policy, payment should be made in accordance with the terms of the policy, and on no other terms; that is to say, to pay when O'Connell had paid the judgment in the action which the Company had tried, and which for that reason it was estopped to say was not an action fixing its obligation under the policy."

So in *Connelly vs. Bolster*, 187 Mass., 266, 72 N. E., 981, where the Court says:

"Whether the Insurance Company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss, and the eighth clause, in terms, provides that no action shall lie for 'any loss under its policy' unless brought by the assured 'to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue'. In the case at bar, Bell has not paid the judgment recovered by the plaintiff, and therefore has no claim against the insurance company. Similar policies have received the same construction in *Frye vs. Gas & Electric Co.*, 97 Me., 241, 54 Atl., 395, 59 L. R. A., 444, 94 Am. St. Rep., 500; *Cushman vs. Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W., 509. It was also adopted in the case of *Travelers Ins. Co. vs. Moses*, 63 N. J. Eq., 260, 49 Atl., 720, 92 Am. St. Rep., 663, where it was held that an assignment of the property of the insured in bankruptcy was payment."

The rule is very forcibly stated in the case of *Finley vs. U. S. Casualty Co.*, 113 Tenn., 587, 83 S. W. 2, where the Court says:

"There is a difference between the effect of a policy which insures directly against liability, and one that insures against loss or damage by reason of liability. Under contracts of the first description, the amount of the policy, up to the extent of the liability incurred by an employer on account of an accident to an employe, becomes, immediately upon the happening of the event on which the liability depends, and the giving of such notice as the policy provides for, an asset of the assured, which, in the absence of any provisions to the contrary in the policy, may be assigned by him, or taken for his debt, subject, of course, to the making of such proofs to perfect the demand as the policy may provide for. Under the policies of the second kind, to which the one before us belongs, the amount of the insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy.

"The rules above stated will be found illustrated and discussed in the following authorities, viz.: As to the characteristics of the two kinds of contracts, respectively: *Anoka Lumber Co. vs. Fidelity & Casualty Co.* (Minn.) 65 N. W., 353 30 L. R. A., 692; *Fenton vs. F. & C. Co.* (Or.) 56 Pac., 1096, 48 L. R. A., 770; *Bain vs. Atkins* (Mass.), 63 N. E., 414, 57 L. R. A., 792, 92 Am. St. Rep., 411; *Frye, Admr. vs. Bath Gas Co.* (Me.), 54 Atl., 395, 59 L. R. A., 444, 94 Am. St. Rep., 400. As to notice: *London Guarantee Co. vs. Siwy* (Ind. App.) 66 N. E., 481; *Travelers Ins. Co. vs. Myers* (Ohio), 57 N. E., 458, 49 L.



R. A., 760; *Smith & Dove Co. vs. Travelers Ins. Co.* (Mass.), 50 N. E., 516.

"Under neither class of these policies is the employe treated as in privity with the parties to the contract. Under each the contract is held to be one between the company and the master, and for the benefit of the latter.

"In *Anoka Lumber Co. vs. Fidelity & Casualty Co.* it is said: 'The defendant claims that it is not liable because the Nelson judgment (the judgment obtained by the employe against the assured) has not been paid by the plaintiff. If it be simply a contract of indemnity, then, under the decision of this Court in *Weller vs. Eames*, 15 Minn., 461 (Gil. 376), 2 Am. Rep., 150, the payment of the judgment is a condition precedent to the right of the plaintiff's recovery.'

"In *Fenton vs. Fidelity & Casualty Co.* it is said: 'There is a distinction made by the authorities between a contract of indemnity against liability for damages and a simple contract of indemnity against damages. In the former case it has very generally been held that an action may be brought, and a recovery had, as soon as the liability is legally imposed, while in the latter there is no cause of action until there is actual damage. *Jones vs. Childs*, 8 Nev., 121; 10 Am. & Eng. Enc. Law, 413; *Smith vs. Chicago & N. W. R. Co.*, 18 Wis., 21; *Thompson vs. Taylor*, 30 Wis., 73; *Locke vs. Homer*, 131 Mass., 93, 41 Am. Rep., 199; *Trinity Church vs. Higgins*, 48 N. Y., 532. \* \* \* If, therefore the policy upon which this action is based is a mere contract of indemnity, the payment by the mill company of the liability incurred by it for the injuries of the plaintiff is a condition precedent to the right of recovery. If, on the other hand, the contract is one of indemnity against liability, a cause of action accrued thereunder as

soon as the liability of the mill company to the plaintiff attached.'

"In *Frye vs. Bath Gas & Elec. Co.*, wherein it appeared that the policy under examination was in practically the same language as the one before the Court, it was said: 'We are unable to perceive any ground upon which the bill can be sustained, and the relief prayed for granted. The contract of insurance was with the gas company to indemnify that company against loss from liability for damages on account of bodily injuries accidentally suffered by the employes, and caused by the negligence of the assured. The use of the word "indemnify" shows the object and nature of the contract. It was to reimburse or make whole the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employes. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability. \* \* \* The difference between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought and recovery had until the liability is discharged, whereas upon the latter the cause of action is complete when the liability attaches. \* \* \* The contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employes, but for its own benefit exclusively—to reimburse it for any sum that the company might be obliged to pay and had paid on account of injuries sustained by employes through its negligence."

*Second:* The second theory is that plaintiff in

error should be held liable by reason of the indemnity agreement executed by Davis, the attorney at law employed by plaintiff in error to defend the Elmo Rock Company.

We feel that it is well settled that an attorney at law is not authorized, by reason of his employment as such, to execute a supersedeas bond on behalf of his employer.

The general authority of an attorney at law does not extend to executing an appeal bond or undertaking for his client.

*Gordon vs. Camp*, 2 Fla., 23;

*Clark vs. Courser*, 29 N. H., 170;

*Ex parte Holbrook*, 5 Cow. (N. Y.), 35;

*Bowen vs. Johnson*, 17 R. I., 779; 24 Atl., 830;

*Murray vs. Peckham*, 15 R. I., 297; 3 Atl., 662;

*Coles vs. Anderson*, 8 Humphr. (Tenn.), 489.

An attorney has no right, as such, either to execute a supersedeas bond without specific instructions or to agree to indemnify the surety executing such bond.

If he had the right to enter into an indemnity agreement, he certainly would have the right to execute the bond himself on behalf of his client. We believe the rule in this respect is well settled. See—

*White vs. Davidson*, 8 Md., 169; 63 Am. Dec., 699;

*Narragaugus Land Proprietors vs. Wentworth,*  
36 Me., 399.

But in this case the right of Davis or of the firm of Meador & Davis to execute such an indemnity agreement or to furnish or obtain a supersedeas bond on behalf of the Pacific Coast Casualty Co. can hardly be said to be a matter of dispute. Davis was most expressly ordered not to procure such a bond.

This is shown by the letter dated June 28th, 1912, and set out in the record at page 141; where the Casualty Company through its attorney instructed Meador & Davis as follows: "Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedeas bond staying execution." And long before the so-called indemnity agreement was issued, the letter of July 30th, 1912, was dispatched and received; and in that letter Meador & Davis were informed by the Pacific Coast Casualty Company: "We endorse your action taken in this matter and will ask you to proceed with the appeal, but assured must furnish its own supersedeas bond. As Sinsheimer & Company are not our agents any longer, we will ask you to kindly communicate with us in connection with all cases which you are handling in our behalf" (Record, p. 144).

The letter of instructions received by Meador & Davis was delivered by Mr. Davis to Stephenson,



the president of defendant in error (Record, pp. 134, 135, 136). Stephenson admits that he received that letter; he thinks he received it when the application for the bond was returned by Davis; but he admits that no application was ever sent by Davis to him (Record, p. 130); and the letter is produced from the papers in the case turned over by Stephenson to attorneys for the defendant in error (Record, p. 126). Stephenson does not recall having seen the letter until he went to examine the papers after there was trouble over the payment of the claim (Record, p. 126). Under the evidence submitted by defendant in error—and that is the only evidence presented in this case—there could be no question but that the indemnity agreement was unauthorized and defendant in error knew that it was unauthorized either at the time the bond was issued or shortly afterwards, when the communication which Davis had promised was received and the copy of the letter sent by plaintiff in error to Davis was placed in the files of the defendant in error. These are the facts of the case as disclosed by testimony presented by plaintiff below.

Suppose, however—and this is not the case at bar—that plaintiff below was not informed by Davis that his authority did not extend to the execution of indemnity agreements and did not extend to the furnishing of supersedeas bonds. Then, under well-settled authorities, defendant in error was charged

with knowledge and notice of the limitations placed upon the authority of Davis; which authority was, by the very nature of the case, in writing and which was admitted to be in writing according to the knowledge of Stephenson, the President of the corporation which is defendant in error. Stephenson himself testifies that he had information that Meador & Davis had power of attorney to execute any paper for plaintiff in error. He goes on to say, "The exact amount of their power of attorney we did not know, and did not know what their limit was" (Record, pp. 125, 126).

Where an individual is dealing with an agent knowing that said person with whom he is dealing is an agent of another, knowing that he has a power of attorney, knowing that, as in the case of one representing a corporation and executing agreements of indemnity for said corporation, said power of attorney should be in writing, and knowing, as is stated in the record, that the said power of attorney was written, the person so dealing with such agent is charged with knowledge of the contents of the power of attorney and is charged with the duty of ascertaining the extent of the authority possessed by such agent. He cannot safely rely upon the agent's statement of authority or upon the mere assumption that he has such authority.

*Mussey vs. Beecher*, 3 Cush. (Mass.), 511;

- Reinforced Concrete Co. vs. Boyes* (Mich.),  
147 N. W., 577;
- Deffenbaugh vs. Jackson Paper Mfg. Co.*, 120  
Mich., 242, 79 N. W., 197;
- Clark vs. Haupt*, 109 Mich, 212, 68 N. W.,  
231;
- Gordeen vs. Pearlman*, 91 N. Y. S., 420;
- Hambro vs. Burnand* (1903), 2 K. B. 399, (rev.  
on other grounds (1904), 2 K. B., 10);
- Delta Lumber Co. vs. Williams*, 73 Mich., 86,  
40 N. W. 940;
- Jonathan Mills Mfg. Co. vs. Whitehurst*,  
72 Fed., 496, 19 C. C. A., 130;
- Wilson vs. Shocklee*, 94 Ark., 301, 126 S. W.  
832;
- Latham vs. Ft. Smith First Nat. Bank*, 92 Ark.,  
315, 122 S. W., 992;
- Pease vs. Fink*, 3 Cal. A., 371, 85 Pac., 657;
- Phillip Carey Co. vs. Thyson*, 39 D. C. App.,  
233;
- Carter vs. Pembroke Nat. Bank*, 11 Ga. A.,  
479, 75 S. E., 824;
- Gore vs. Canada Life Assur. Co.*, 119 Mich.,  
136, 77 N. W., 650;
- Rice vs. Grand Rapids Peninsular Club*,  
52 Mich., 87, 17 N. W., 708;
- Trull vs. Hammond*, 71 Minn., 172, 73 N. W.,  
642;
- Mathes vs. Switzer Lumber Co.*, 173 Mo. A.,  
239, 158 S. W., 729;

- Friedman vs. Kelly*, 126 Mo. A., 279, 102 S. W., 1066;  
*Fitzgerald vs. Kimball Bros. Co.*, 76 Nebr., 236, 107 N. W., 227;  
*MacLatchy vs. Hannan*, 104 App. Div., 70, 93 N. Y. S., 282;  
*Saranac vs. Groton Bridge, etc., Co.*, 55 App. Div., 134, 67 N. Y. S., 118;  
*Shull vs. New Birdsall Co.*, 15 S. D., 8, 86 N. W., 654;  
*O'Daniel vs. Streeby*, 77 Wash., 414, 137 Pac., 1025;

Now, if the person makes no inquiry, but chooses to rely on the agent's statement, then he is charged with knowledge of the limit placed upon the agent's authority and cannot complain.

- Molloy vs. Whitehall Portland Cement Co.*, 116 App. Div., 839, 102 N. Y. S., 363;  
*Sloan vs. Brown*, 228 Pa., 495, 77 A., 821, 139 Am. S. R., 1019;  
*Nova Scotia Bank vs. Richards*, 33 N. B., 412 (aff. 26 Can. S. C., 381).

Such is the well established rule in this jurisdiction.

- Davis vs. Trachsler*, 3 Cal. App., 554;  
*Solari vs. Snow*, 101 Cal., 387;  
*McDonald vs. Cool*, 134 Cal., 502;  
*Robinson vs. American Fish etc. Co.*, 17 Cal. App., 212.



*Third:* The third theory upon which plaintiff below appears to rely is that said plaintiff, defendant in error herein, is an assignee of a policy of insurance issued by the defendant to the Elmo Rock Company, and that as such assignee, having paid the loss, it is entitled to recover. This is, we believe, the gist of the contention made by defendant in error.

The contract of plaintiff in error is, however, merely to pay when the assured had made payment. It was only when the assured had satisfied a judgment within ninety days after said judgment became final that the plaintiff in error was called upon or could be called upon under its policy to pay the amount of a judgment to the assured.

“Where the policy requires payment of the loss by the assured, the Policy is not assignable until the assured has paid the loss.”

*Finley vs. Casualty Co.*, 113 Tenn., 587,  
83 S. W., 2.

“Where the obligation is to indemnify against a loss actually sustained and paid in satisfaction of a judgment no recovery can be had against the insurer where the judgment against the assured is not paid.”

*Cushman vs. Fuel Co.*, 122 Iowa, 656, 98  
N. W., 509;

*Carter vs. Ins. Co.*, 76 Kan, 275, 91 Pac., 178,  
11 L. R. A. (N. S.), 1155;

*O'Connell vs. R. Co.*, 187 Mass., 272, 72 N. E.,  
979;

*Kennedy vs. Fidelity etc. Co.*, 100 Minn., 1,  
110 N. W. 97, 117 Am. St. Rep., 658,  
9 L. R. A. (N. S.), 478;

*R. Co. vs. Waymire* (Tex. Civ. App.), 89  
S. W., 452;

*Stenborn vs. Engine Co.*, 137 Wisc., 564, 119  
N. W., 308, 20 L. R. A. (N. S.), 956.

“Under policies that insure against loss or damage by reason of liability, the amount of the insurance does not become available until the *assured* has paid the loss.”

*Burke vs. Guarantee etc. Co.*, 47 Misc., 171,  
93 N. Y. Supp., 652;

*Tube etc. Co. vs. Casualty Co.*, 220 Pa., 42,  
68 Atl., 1026;

*Henderson vs. Casualty Co.*, 29 Pa. Super. Ct.,  
398;

*Finley vs. Casualty Co.*, 113 Tenn., 592,  
83 S. W., 2;

*Allen vs. Ins. Co.*, 145 Fed., 881; 76 C. C. A.,  
265, 7 L. R. A. (N. S.), 958;

*Nesson vs. U. S. Casualty Co.*, 201 Mass., 71;

*Connolly vs. Wilfred Bolster*, 187 Mass., 266,  
72 N. E., 981;

*O’Connell vs. N. Y., N. H. and H. R. R. Co.*,  
187 Mass., 272;

*Van Reen vs. Aetna Life Ins. Co.*, 209 Fed.,  
693;

*West Riverside Coal Co. vs. Maryland Casualty Co.*, 165 Iowa, 163;

*Allen vs. Gillman*, 137 Fed., 136.

Cases of this character have constantly been presented to the courts. Usually the question has been whether the assured has a right to bring an action upon such a policy, and the uniform current of authority is that the assured cannot so do.

*Frye vs. Bath Gas & Electric Co.*, 54 Atlantic, 395.

See also:

*Moses vs. Travelers Ins. Co.*, 49 Atl., 720;

*Gilbert vs. Winman*, 1 N. Y., 550;

*Cushman vs. C. F. Co.*, 98 N. W., 508;

*Carter vs. Aetna Life Ins. Co.*, 91 Pac., 178;

*Allen vs. Gilman & McNeil Co.*, 137 Fed., 136;

*Allen vs. Aetna Life Ins. Co.*, 145 Fed., 881;

*Saratoga T. R. Co., vs. Standard Acci. Co.*, 128 N. Y. S., 822;

*Conqueror Z. & L. Co. vs. Aetna Life Ins. Co.*, 133 S. W., 156;

*Munro vs. Maryland Cas. Co.*, 96 N. Y. S., 705;

*Appel vs. Peoples' Surety Co.*, 132 N. Y. S., 200;

*Burk vs. London G. & A. Co.*, 93 N. Y. S., 652, affirmed in 93 N. E. 1117;

- Kennedy vs. Fid. & Cas. Co.*, 110 N. W., 97;  
*Connolly vs. Bolster*, 72 N. E., 981;  
*Stenbohm vs. Brown-Corliss Co.*, 119 N. W.,  
 308;  
*Cayard vs. Robertston & Hobbs*, 131 S. W.,  
 864;  
*O'Connell vs. Ry. Co.*, 72 N. E., 979;  
*Maahs vs. Antigo Lbr. Co.*, 145 N. W., 222;  
*Pfeiler vs. Penn Allen Portland Cement Co.*,  
 87 Atl., 623;  
*Beyer vs. International A. C.*, 101 N. Y. S., 83;  
*Camel vs. Maryland Casualty Co.*, 89 S. W.  
 452;  
*Brewster vs. Empire State*, 130 N. Y. S., 439;  
*Poe vs. Philadelphia Casualty Co.*, 84 Atl.,  
 476;  
*Henderson vs. Maryland Casualty Co.*, 69  
 S. E., 234;  
*Stevens vs. Pacific Cas. Co.*, 3 Am. & Eng.  
 Ann. Cas., 480;  
*Fuller's Employers' Liability Ins.*, pp. 451 to  
 458.

The difference between a contract of indemnity and one to pay legal liability is, that upon the former an action cannot be brought and a recovery had until the liability is discharged.

*American Employers vs. Fordyce*, 36 S. W.,  
 1051.



"There is a difference between the effect of a policy which insures directly against liability and one that insures against loss or damage by reason of liability."

*Finley vs. United States Casualty Co.*, 83  
S. W., 2.

"We are unable to perceive any ground on which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the gas company to indemnify that company 'against loss' from liability for damages on account of bodily injuries accidentally suffered by an employe and caused by the negligence of the assured. The use of the word 'indemnity' shows the object and nature of the contract. It was to reimburse, or make whole, the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employes. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability. \* \* \* In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employes, but for its own benefit exclusively. \* \* \* Independently of the condition in the contract of insurance above quoted, we should be compelled to construe this contract as one of indemnity only."

*Frye vs. Bath Gas & Electric Co.*, 54 Atlantic,  
395;

*Ford vs. Aetna Life Insurance Company*, 70 Wash., 29;  
*Scheard vs. United States, etc.*, 58 Wash., 29;  
*Puget Sound Improvement Co. vs. Frankfort*, 52 Wash., 124.

In *Ford vs. Aetna*, *supra*, p. 33, the Court says:

"We cannot assent to the respondent's interpretation of the policy. The policy indemnifies against loss, and not against liability."

"In clause B the appellant reserved the privilege and assumed the obligation of defending claims for damages covered by the policy. But this does not imply that in the event the defense is unsuccessful it will pay the judgment." *Ibid.*, 34.

"The respondent has no rights in the policy, either legal or equitable. The policy was not written for his protection, but it was written for the purpose of indemnifying the insured against loss sustained and paid." *Ibid.*, 36.

"Subject to exceptions not here present, the plaintiff in garnishment can get no better right to the debt garnished than his debtor has; and if the latter has no right in or to the debt, the former acquired none in the garnishment." *Ibid.*, 37.

*Fidelity & Casualty Co. of N. Y. vs. Martin*, 173 S. W., 307,

where the Court says:

"The policy in question was not written for the protection of appellee or *even remotely for his benefit*. Its sole object was to indemnify the assured, Wells, against loss sustained and paid. As said in 15 Cyc., subd. 8, p. 1038:

"Insurance under a policy of this kind is a matter wholly between the insurance company and the assured, in which the employe has no legal or equitable interest any more than in any other property belonging absolutely to the assured."

173 S. W., 310,

after citing a Tennessee case, the Court said:

"In directing the dismissal of the bill the Supreme Court of Tennessee held that an employe obtaining a judgment against his employer for a personal injury would not, on the insolvency of the latter, be entitled to a decree against an insurer in an indemnity policy, stipulating indemnity to the employer against loss for damages on account of bodily injuries, and that no action would lie against the insurer unless brought by the employer to reimburse himself for loss actually sustained—i. e., paid—although the insurer, following the happening of the accident and notice thereof, took exclusive control of the negotiations for a settlement and of the defense of the action brought by the employe for his injuries. This ruling seems to have been rested upon the ground that there was no privity of contract between the servant injured and the insurance company; *that the fund providing for an indemnity is not a trust fund.* \* \* \* 'We had occasion in *Finley vs. Casualty Co.*, 113 Tenn., 592 (83 S. W., 2,

3 Ann. Cas., 962), to consider a policy in all material respects like the one at bar. We there recognized the distinction made by the authorities between a policy insuring an employer *against liability* and *one agreeing to indemnify the assured "against loss from liability for damages"'. "*

Ibid, 312.

"Since it has no right of action there is nothing to which the plaintiff could be subrogated."

Quoted from *Pfeiler vs. Penn Allen Portland Cement Co.*, 240 Pa., 468.

"Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins."

*Bain vs. Atkins*, 181 Mass., 240.

"This view of the matter seems to overlook the fact that the purpose of the insurance company in framing its contract, as was done in that case, and the *instant case was not so much to require a solvent assured to first pay the judgment, as to prevent itself from being subrogated to a loss, which an insolvent assured was relieved by his insolvency from paying.*"



"It was said in argument, and not controverted, that in 20 of the states the courts of last resort have given the insurance contract under consideration the construction here contended for by appellant, and that only in New Hampshire and Minnesota have the courts of last resort adopted the construction contended for by appellee. \* \* \* While we accord great weight to the ability and high standing of the two courts referred to, their interpretation of the contract is so obviously out of harmony with the current of authority that we deem it unwise to adopt it."

173 S. W., p. 314.

"However deserving appellee may be of compensation what he is asking us to do is to aid him, a stranger to the contract, by giving it a meaning not authorized by its language, and that neither of the real parties to it intended it to have."

173 S. W., p. 314.

"The policies are written, not for the sake of injured employes, but for the benefit of employers, who have suffered loss by reason of their common law, or statutory liability. The premiums are paid by the employers, and the employers are the beneficiaries thereof. The policies now most commonly in force are contracts of indemnity against loss, and not of insurance against liability. They are not subscribed to for the benefit of injured employes, and there is no privity between them and the employers."

*Fullers' Employers' Liability Insurance*, pp. 464, 465.

"An ordinary indemnity contract of this character is not made for the benefit of the employe either in its express terms or in its underlying purposes."

*Clark vs. Bonsal*, 72 S. E., 954;

*Camel vs. Maryland Casualty Co.*, 97 N. E., 1026;

*Stenbohm vs. Brown-Corliss Co.*, 119 N. W., 308, 20 L. R. A. (N. S.), 956.

#### RE RATIFICATION OF UNAUTHORIZED ACT.

Davis' act being unauthorized, we insist that upon this record there is no evidence of ratification by this defendant. There is no evidence whatsoever that this Company ever knew of the giving of the indemnity agreement, or that the bond was applied for by Davis himself until the time of the bringing of this suit, or, to be more specific, until the time when the judgment having been paid by the plaintiff Company it called upon defendant below to reimburse it. It is elemental that ratification cannot exist unless the principal has knowledge of the act claimed to be ratified. The only thing suggestive of ratification is the payment of the premium, but this premium was paid in ignorance of the fact that the bond was issued at the request of Davis, and in total ignorance of the indemnity agreement. The premium on the bond was paid because this defendant below had agreed to insure the Elmo Rock Company against loss and *expense*. It was one of the expenses of the

litigation. Suppose the judgment against the Elmo Rock Company had been twenty-five thousand dollars instead of five thousand dollars, a stay bond would probably have been double that amount, or fifty thousand dollars. This Honorable Court would not hold it the duty of this plaintiff in error to furnish a stay bond in that amount, it being largely in excess of the five thousand dollars insurance mentioned in our policy. Yet in such instance, if the Elmo Rock Company obtained a bond from some surety company in the sum of fifty thousand dollars, or thereabouts, we would have been obliged to pay the premium thereon, and such obligation arises simply because said premium is an item of expense connected with the litigation.

#### LEEDS WAS MERELY A SOLICITING AGENT.

The general agent of the Company in Texas was J. F. Seinsheimer & Company. Their power or authority as general agent had ceased before Davis signed the indemnity agreement with defendant in error (See letter of July 30th, 1912, Record, page 144). But Leeds was merely a soliciting agent (See his deposition, Record, pp. 117, 118, 119). There is no testimony that the general agent, even had his authority still existed, ever authorized the giving of the indemnity agreement, save the mere thought or impression of Leeds, which was not admissible, and

which we moved to strike out, which motion was denied by the Court.

It is well established that the soliciting agent has not authority to bind his Company.

*Shuggart vs. Lycoming Fire Ins. Co.*, 55 Cal., 408, 414;

*Enos vs. Sun Insurance Co.*, 67 Cal., 621;

*Gladding vs. Cal. Farmers' M. F. I. A.*, 66 Cal., 6;

*Cayford vs. Metropolitan Life Ins. Co.*, 5 Cal. App., 715;

*Iverson vs. Metropolitan Life Ins. Co.*, 151 Cal., 746;

*Westerfeld vs. N. Y. Life Ins. Co.*, 129 Cal., 68;

*Farnum vs. Phoenix Ins. Co.*, 83 Cal., 246, 260-262;

*Raulet vs. Northwestern Nat. Ins. Co.*, 157 Cal., 213;

*Mackintosh vs. Agricultural Fire Ins. Co.*, 150 Cal., 440; 19 Am. St. Rep., 234;

*McKay vs. New York L. Ins. Co.*, 124 Cal., 270;

*Northern Ass. Co. vs. Grand View B. A.*, 183 U. S., 303; 46 Law Ed., 231.



The test as to whether a person is a soliciting or general agent is very clearly drawn in this State.

*Iverson vs. Met. Life Ins. Co.*, 151 Cal., 747;  
*Westerfeld vs. N. Y. Life Ins. Co.*, 129 Cal.,  
 68;

*Raulet vs. Northwestern etc. Ins. Co.*, 157 Cal.,  
 213;

*Mackintosh vs. Agricultural Fire Ins. Co.*, 150  
 Cal., 440.

In other words, Leeds as a soliciting agent had no authority to enter into or consummate a contract on behalf of this defendant, and whatever he may have done in the premises, unless communicated to and ratified by this defendant, is immaterial.

Plaintiff proceeds to argue that the knowledge obtained by the soliciting agent is imputable to the defendant. But such is not the case. The knowledge of a soliciting agent is not the knowledge of the Company.

*Shuggart vs. Lycoming Fire Ins. Co.*, 55 Cal.,  
 408, 414;

*Enos vs. Sun Insurance Co.*, 67 Cal., 621;

*Gladding vs. Cal. Farmers' M. F. I. A.*, 66  
 Cal., 6;

*Cayford vs. Metropolitan Life Ins. Co.*, 5 Cal.  
 App., 71;

*Iverson vs. Metropolitan Life Ins. Co.*, 151 Cal., 746;

*Westerfeld vs. N. Y. Life Ins. Co.*, 129 Cal., 68.

We therefore respectfully submit that the judgment appealed from herein should be reversed, and this plaintiff in error granted a new trial. The defendant in error did not by reason of paying the judgment under its supersedeas bond have any right of action against this plaintiff in error. The only rights to which it was subrogated as surety, having discharged the judgment, were the right to reimbursement from the Elmo Rock Company. The judgment was not paid or discharged by the Elmo Rock Company, or by defendant in error, if it were paid or discharged at all. The record, however, indicates that it was not discharged, but merely bought or purchased by the surety. As to the indemnity agreement, Mr. Davis was not the agent of this plaintiff in error for the purpose of signing any such agreement. His act was void, and never was ratified by the plaintiff in error, as said plaintiff in error never had knowledge or notice of his act. The policy of insurance set out in the complaint is unassignable until after loss has been sustained and paid by the assured.

Under every view of the case, we respectfully insist

that the judgment is erroneous and that a new trial should be ordered.

Respectfully submitted.

MYRICK & DEERING,  
Attorneys for Plaintiff in Error.

JAMES WALTER SCOTT,  
Of Counsel.

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No. 2735.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT, AT SAN FRANCISCO.

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PACIFIC COAST CASUALTY COMPANY,  
*Plaintiff in Error,*

v.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,  
*Defendant in Error.*

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Upon Writ of Error to the District Court of the United States  
for the Northern District of California, Second  
Division, at San Francisco.

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BRIEF FOR DEFENDANT IN ERROR

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R. S. GRAY, San Francisco, Cal.,  
LOCKE & LOCKE, Dallas, Texas,  
*Attorneys for Defendant in Error.*





# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

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PACIFIC COAST CASUALTY COMPANY

v.

GENERAL BONDING AND CASUALTY  
INSURANCE COMPANY.

} No. 2735.

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### BRIEF FOR DEFENDANT IN ERROR.

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#### INTRODUCTORY.

The writer of this brief lives so far from San Francisco that unless the brief for the plaintiff in error shall be filed sooner than the rules require we shall have no opportunity to make direct reply thereto. There are nineteen assignments of error, and the nineteenth is subdivided into nineteen specifications; and yet the merits of the case lie within narrow boundaries. For these reasons we ask the court's permission to present the case of the defendant in error independently, and to leave for a supplemental memorandum any direct response that we may wish to make to the brief of the plaintiff in error if received in time for answer.

#### FACTS OF THE CASE.

Under date of June 18, 1911, the defendant issued to Elmo Rock Company a policy of employer's liability insurance, running for the term of one year and covering its business of quarrying and crushing rock. The policy contained, among others, the following provisions relevant to this litigation (Tr., 13-21, 149).

"In consideration of the warranties herein and of Eighty-four and 00-100 Dollars (\$84.00) estimated premium, the Pacific Coast Casualty Company, of San Francisco, California,

hereinafter called the Company, hereby insures the Elmo Rock Company of the County of Kaufman, State of Texas, hereinafter called the Assured, against loss and expense arising from claims upon the Assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any employee of the Assured by reason of the prosecution of the work described herein. This insurance is subject to the following conditions.

"A. The Company's liability on account of an accident to one person is limited to Five Thousand and 00-100 Dollars (\$5,000)\*\*\*\*.

"B.\*\*\*\* If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same. If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent, every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company.

"C. The Assured shall render to the Company at all times all co-operation and assistance in his power

"L. No action shall lie against the Company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

Within the time limit and the conditions of the policy, one J. B. Sowders, an employee of Elmo Rock Company, sustained injuries on account of which he sued it (Tr., 111-112, 89-90). Having been duly notified of the accident, the claim and the suit, Pacific Coast Casualty Company undertook the defense of the suit; which it conducted through counsel employed by it, but in the name of Elmo Rock Company. The attorney so employed was John Davis, of the firm of Meador & Davis, whom the defendant habitually employed in its controversies in that locality. The suit resulted in a judgment in favor of Sowders for \$5,000 and interest and costs (Tr., 90, 114, 131).

Davis notified the defendant of the rendition of the judgment, and was instructed as follows by letter dated June 28, 1912: "Kindly proceed with the appeal of this case, but you will understand that we do not furnish a supersedeous (sic)

bond staying execution" (Tr., 132, 140-141). Davis requested Elmo Rock Company to furnish a supersedeas appeal bond; but it refused to do so, upon the ground that Pacific Coast Casualty Company should do this. Davis wrote again urging that the Rock Company furnish the bond. A copy of the correspondence having been forwarded to the defendant, it wrote to Davis July 30, 1912, saying: "We endorse your action in this matter and will ask you to proceed with the appeal, but the assured must furnish its own supersedeous (sic) bond" (Tr., 142-144).

Under the law of Texas, Sowders was entitled to an execution on his judgment twenty days after the overruling of the motion for a new trial, unless a supersedeas bond on appeal were theretofore filed. This time would expire August 9, 1912. By filing within twenty days a supersedeas bond, which might be made by a surety company, execution could be stayed pending appeal. Copies of the statutes are annexed to the complaint for the convenience of all concerned. This court and the district court take judicial cognizance of them (Tr., 22-24, 26).

W. L. Leeds, as managing partner of Miller-Stemmons Company, was agent for Pacific Coast Casualty Company under J. F. Seinsheimer & Co. of Galveston, its general agents. Through his agency the employer's liability policy in suit was issued. He also "brokered" some business with the plaintiff (Tr., 113-114). He testified that he thought, though he could not speak positively, that his firm was authorized by J. F. Seinsheimer & Co. to have executed the appeal bond which was procured from the plaintiff (Tr., 120), and the court found that such authority was given (Tr., 76). He testified that when the bond had to be made, he called on Mr. Stephenson, president of the plaintiff company, and the latter consented to make the bond provided an indemnity bond were given by the defendant company (Tr., 117). He procured such an indemnity bond, he testified, from the defendant company through the attorneys, Meador & Davis (Tr., 115). He paid to the plaintiff the premium for the appeal bond, and was reimbursed for the outlay by the defendant company through J. F. Seinsheimer & Co. (Tr., 116-117).

Davis testified that he spoke to Mr. Stephenson, president of the plaintiff company, about making the appeal bond, and showed him the defendant company's letter of June 28, 1912, above mentioned, and left it with Mr. Stephenson. He could



not remember any of the conversation, but was sure that he exhibited the letter. He signed and delivered the indemnity contract hereinafter mentioned, which he said was prepared by Stephenson (Tr., 133-138).

Stephenson testified that Davis applied to him for the appeal bond, furnished the form of it, and said that the judgment would be taken care of if affirmed, and that the defendant would indemnify his company. He said there was no discussion of Davis' authority, and that he understood that Davis had authority to do what was done. His recollection was that the appeal bond was executed on Davis' oral assurance, and that the indemnity agreement, which Davis prepared as he had promised to do, and probably a formal application for bond, were sent in afterward. He said it was the custom for attorneys at law to apply for appeal bonds, and that it was customary for him to issue them on oral application to be followed by formal written application, and that he had made other appeal bonds for Davis. He was unable to find a written application for the bond in this case, and was not sure that one was received. He said Davis did not show him the company's letter of June 28, 1912, and that he never saw it until he found it among the papers when he was called upon to pay the judgment after its affirmance (Tr., 121-130).

The court found that Stephenson was not shown the company's letter of June 28, 1912, and was not in any way made aware of any limitations upon the authority of Davis, and dealt with him in the supposition that his authority was that which was usual in such cases, and was apparently possessed by him (Tr., 78).

Accordingly, Davis delivered to the plaintiff company a paper dated August 6, 1912, and signed "Pacific Coast Casualty Company, by John Davis, its attorney at law and in fact," whereby the defendant agreed to indemnify the plaintiff against all loss and expense incurred by reason of signing the desired supersedeas appeal bond in the Sowders case, a copy of which paper is attached to the complaint as Exhibit D (Tr., 132, 136, 115, 127, 24-25, 76-78).

In consideration of the indemnity agreement and of the payment of a premium therefor, the plaintiff executed under date of August 6, 1912, a supersedeas appeal bond in the Sowders case, a copy of which is annexed to the complaint as Exhibit E. This bond was signed by Elmo Rock Company as principal, and was approved and filed August 7, 1912, thus

accomplishing the appeal from the judgment and the stay of execution thereon (Tr., 26-27, 132, 127, 75, 153).

The appeal resulted in the affirmance of the judgment and the consequent rendition of judgment against both Elmo Rock Company and the plaintiff for the amount of the principal, interest and costs. The mandate of the court of civil appeals was filed in the district court August 18, 1913, that being, under the Texas practice, the final step in the litigation (Tr., 29-30, 154, 78-79).

Execution was duly issued on the Sowders judgment, and was levied by the sheriff on a large amount of real and personal property belonging to Elmo Rock Company (Tr., 154-164). Thereupon a stockholder applied for the appointment of a receiver, a receiver was appointed, and the property levied upon was delivered by the sheriff to the receiver (Tr., 173-181, 162, 108). Sowders then sued out an alias execution for the collection of his judgment from the plaintiff company (Tr., 93, 97, 79-80).

Thereupon, on October 22, 1913, less than ninety days after the filing of the mandate, the plaintiff company paid to Sowders and his attorneys and assignees the amount then due for the principal and interest of his judgment, \$5,400.50; and on October 25, 1913, it paid the court costs, amounting to \$160.40. The owners of the judgment assigned it to the plaintiff company when its amount was paid to them. The plaintiff company made this payment in discharge of its obligation upon the supersedeas appeal bond, and also upon the request of the receiver of Elmo Rock Company (Tr., 34-38, 127, 102-103, 80).

Afterward, on November 4, 1913, under order of the court in which the receivership suit was pending, the policy of employer's liability insurance issued by the defendant to Elmo Rock Company was assigned by the receiver of that company to the plaintiff (Tr., 33-38, 102-103, 109, 80). The defendant having refused to pay the policy, this suit was brought to recover thereon.

The receiver testified that the property levied upon by the sheriff in the Sowders case, and then in the hands of the receiver, consisted of nineteen acres of land worth \$19,000 and encumbered by a lien of \$3,500 prior to the execution lien, and of personal property estimated at some \$4,000 or \$5,000 (Tr., 108), and that the total indebtedness of the company

was some \$10,000 (Tr., 111). The court found that the land levied on was worth \$19,000 with a lien of \$3,500 prior to the execution lien (Tr., 80).

### MORALS OF THE CASE.

The writer of this brief has an abiding faith in the proposition that courts sit to do justice, and not merely to settle disputes, and that a court always wishes to do justice, and always will do it unless it finds legal obstacles which seem to it insuperable. As a matter of right the plaintiff ought to recover in this case in accordance with the judgment of the court below. The defendant, for a premium, insured Elmo Rock Company against loss from the Sowders claim. In the exercise of its contract right, it assumed entire control of the defense of the Sowders claim. Perhaps Elmo Rock Company could have defended it more successfully. When defeated in the trial court, the defendant and Elmo Rock Company together procured the plaintiff to obligate itself for the payment of the Sowders judgment by signing as surety a supersedeas appeal bond. In other words, they requested the plaintiff to pay it in Elmo Rock Company's behalf if it should be affirmed and they should fail to pay it themselves. To this extent at least there can be no doubt that the act of Leeds and Davis was by the defendant either authorized or ratified or both. In addition, the defendant's attorney Davis expressly agreed in its name to indemnify the plaintiff against all loss and against all incidental expense that might ensue. The plaintiff required this contract of indemnity as a condition to its making the supersedeas appeal bond. It accepted the contract of indemnity and made the bond, in reliance upon the apparent authority of Davis to do what he did do, and in ignorance of any limitations upon that authority. The appeal failed, and according to the usages of the business the defendant should have paid the judgment. It refused to do so. Execution was levied upon the property of Elmo Rock Company, and thereby a receivership of that otherwise solvent corporation was precipitated. In pursuance of the request of the receiver then made, and of the request of the defendant and Elmo Rock Company made when the supersedeas bond was procured, the plaintiff, in behalf of Elmo Rock Company, paid the full amount due upon the judgment and took an assignment thereof. Thus it holds against Elmo Rock Company the judg-



ment and an execution lien upon land which the receiver testified, and the court found, to be fairly worth more than twice the amount of the judgment, over and above prior encumbrances. In consideration of this payment the receiver transferred the defendant's policy to the plaintiff as an additional, and the primary, security for the debt. The defendant ought to pay; and the only question is whether it has brought to the court's attention any defense which will enable it to avoid payment. We shall consider first the defenses urged which appear to be of substantive character, and then the criticisms made by the defendant upon the procedure and findings of the trial court.

## DEFENSES URGED.

### ASSIGNABILITY OF POLICY IN SUIT.

#### PROPOSITION.

The policy of liability insurance sued upon has been validly assigned to the plaintiff, which has the right to sue thereon.

#### Statement.

The seventeenth assignment of error (Tr., 208-210) is based upon the court's admission in evidence of the assignment of the policy in suit, over an objection to the effect that the policy was not assignable to the plaintiff in the circumstances that existed. The eighteenth assignment of error (Tr., 211-212) is based upon the action of the court in overruling the defendant's motion for a nonsuit, which in turn was founded in part upon the proposition that the assignment of the policy of liability insurance to the plaintiff was void, and that the policy was not assignable.

In pursuance of an order of court authorizing him to do so (Tr., 33-34, 172-183), the receiver of Elmo Rock Company on November 4, 1913, assigned the policy to the plaintiff by a written instrument, which recited at considerable length the antecedent circumstances and the consideration of the assignment. After reciting the issuance of the policy, and the recovery by Sowders of a judgment for an injury sustained by him and coming within the purview of the policy, and the appeal from said judgment by Elmo Rock Company upon a supersedeas bond made by the plaintiff, and the affirmance of said judgment, and the appointment of W. D. Fletcher as re-



ceiver for Elmo Rock Company, the assignment proceeded with recitals as follows:

“And whereas at the request of said W. D. Fletcher as receiver and in the discharge of its obligations as surety upon the supersedeas appeal bond aforesaid, said General Bonding & Casualty Insurance Company has on this 22d day of October, 1913, paid to the owners and holders of said judgment the amount due them thereon, to wit, the sum of five thousand four hundred dollars and fifty cents, and in addition has paid to the officers of court the costs taxed in said cause, to wit, the sum of one hundred sixty dollars and forty cents, thereby discharging said judgment in full as between said Elmo Rock Company and the owners and holders of said judgment other than said General Bonding & Casualty Insurance Company itself. And whereas, by virtue of the premises said General Bonding & Casualty Insurance Company has become subrogated to all the securities held by said Elmo Rock Company for the payment of the indebtedness represented by said judgment, and has become entitled to have all such securities duly transferred to it. And whereas, said W. D. Fletcher, as receiver, has been authorized and instructed by order of the District Court of Kaufman County, Texas, to assign and transfer said liability policy to said General Bonding & Casualty Insurance Company, the same being a security held by Elmo Rock Company for the payment of the debt represented by said judgment” (Tr., 34-37).

C. M. Crumbaugh, attorney for Elmo Rock Company at the time of the Sowders suit, and afterwards for the plaintiff in the receivership suit against Elmo Rock Company, and apparently for the receiver, testified that the various recitals contained in the assignment were in accordance with the facts (Tr., 103).

### Argument.

When the supersedeas appeal bond was signed by Elmo Rock Company as principal and by the plaintiff as surety, by its act in executing the bond Elmo Rock Company impliedly requested the plaintiff to pay the judgment appealed from if it should be affirmed and if Elmo Rock Company should not pay it, and impliedly agreed to indemnify the plaintiff against any loss so incurred. After the judgment had been affirmed, and an execution had been levied upon the property of Elmo Rock Company, and a receiver had been appointed for that company, and the sheriff had turned over to him the property levied upon, and an alias execution had been issued for the

purpose of collecting the judgment from the plaintiff, in consequence of the situation so created and in pursuance of some further request made by the receiver, the plaintiff paid to the holders of the judgment and the officers of the courts the amount of the judgment and interest and costs, taking from its owners an assignment of the judgment and from the receiver an assignment of the policy. The policy was assigned by the receiver as a security for the debt owing by Elmo Rock Company to the plaintiff, because Elmo Rock Company was under obligation to reimburse the plaintiff for the money expended and because it was thought that the plaintiff was entitled to be subrogated especially to the policy.

The consideration for the assignment was meritorious and entirely sufficient; but even if it had not been so, any defect of consideration would have been a matter of no concern to the defendant.

The policy contains no clause undertaking to prohibit its assignment. In this respect it differs from many policies of insurance. But such a clause, even if there were one, would be ineffective to prevent the assignment of the policy after its term had expired, and when it was valuable only as a contract for the payment of a loss already accrued and merged in judgment.

Maryland Casualty Co. v. Omaha Electric Light & Power Co., 85 C. C. A. 106, 157 Fed. 514; Bowron v. Georgia Casualty Co., 223 Fed. 673; Fenton v. Fidelity & Casualty Co., 36 Ore. 283, 56 Pac. 1096; Beacon Lamp Co. v. Travelers Ins. Co., 61 N. J. Eq. 59, 47 Atl. 579; Moses v. Travelers Ins. Co., 63 N. J. Eq. 260, 49 Atl. 720; 2 May on Insurance (4th ed.), § 386; Fuller on Accident and Employers' Liability Insurance, 469; 1 Bacon on Benefit Societies (3rd ed.), § 300; Richards on Insurance (3rd ed.), § 268.

## PAYMENT OF THE JUDGMENT.

### PROPOSITION.

The Sowders judgment was so paid as to constitute it a loss for which Elmo Rock Company and the plaintiff as its assignee are entitled to be reimbursed by the defendant under the terms of the policy sued upon.

## Statement.

The eighteenth assignment of error (Tr., 211-212) is based upon the action of the court below in overruling the defendant's motion for a nonsuit, which was founded in part upon its proposition

"That said policy of insurance is a policy of indemnity against loss by the assured, the Elmo Rock Company; that the Elmo Rock Company has never suffered loss, has never been called upon to pay and has never paid anything in connection with the case of Sowders vs. Elmo Rock Company."

The seventeenth subdivision of the nineteenth assignment of error is as follows (Tr., 217):

"The evidence was and is insufficient and there is no evidence to sustain the finding of the court that loss or expense was actually sustained and paid in satisfaction of a final judgment by Elmo Rock Company within ninety days from the date of said judgment, and after trial of the issue, for the reason that the evidence shows that said Elmo Rock Company did not sustain and pay any loss or expense in satisfaction of any final judgment, and the evidence shows that no such loss or expense was paid within ninety days from the date of said judgment and after trial of the issue."

The contention made in these two assignments is predicated upon paragraph L of the policy, reading as follows (Tr., 18-19):

"No action shall lie against the company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

## Argument.

The policy in suit is more than a policy of indemnity. *Finley v. United States Casualty Co.*, 113 Tenn. 592, 83 S. W. 2, is typical of the cases upon which the defendant's counsel will rely in support of their contention. The great difference between the policy in suit and those involved in such cases may be shown by printing in parallel columns the relevant provisions of the policy here sued on and the one sued on in the *Finley* case.

**Case at Bar.**

"In consideration of the warranties herein and of Eighty-four and 00-100 Dollars (\$84.00)

**Finley Case.**

"In consideration of \$28.80 premium the United States Casualty Company, herein



estimated premium, the Pacific Coast Casualty Company, of San Francisco, California, hereinafter called the Company, hereby insures the Elmo Rock Company of the County of Kaufman State of Texas hereinafter called the Assured, against loss and expense arising from claims upon the Assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any employee of the assured by reason of the prosecution of the work described herein. This insurance is subject to the following conditions."

"Upon the occurrence of an accident the Assured shall give to the Company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable; and the Company, at its own expense, will make such investigation as it may deem necessary. If a claim is made on account of an accident, the Assured shall give like notice thereof; and the Company, at its own expense, will settle or contest the same.

"If a suit is brought on account of an accident, the Assured shall forward immediately to the Company, or to its duly authorized agent, every process and paper served on him. The Company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The Assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the Company."

"The Assured shall render to

called the company, **does hereby agree to indemnify** the Johnson City Veneer Mills \*\*\* herein called the assured, for the term of twelve months, \*\*\* subject to the following special and general agreements, which are to be construed as coordinate, as conditions; **against loss from common law or statutory liability for damages** on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy, by any employee or employees, of the assured while on duty within the factory, shop or yards mentioned in the schedule hereinafter given, or upon the ways immediately adjacent thereto provided for the use of such employees or the public, in and during the operation of the trade or business described in the said schedule."

"The assured upon the occurrence of an accident shall give immediate written notice thereof with the fullest information obtainable at the time, to the home office of the company at New York, or to its duly authorized agent. He shall give like notice with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all co-operation and assistance in his power."

"If thereafter any suit is brought against the assured to enforce a **claim for damages on account of an accident covered by this policy**, the assured shall immediately forward to the home office of the company every summons or other process as soon as the same shall have been served on him, and the company will at its own cost, defend against such proceeding in the name and on behalf of the assured or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of special agreements as limited therein."

"The assured shall not settle any claim except at its own cost, nor incur any expense, nor interfere in any negotiation for



the Company at all times all co-operation and assistance in his power."

settlement or in any legal proceeding, without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information, evidence, and the attendance of witnesses and in effecting settlements and in prosecuting appeals."

"No action shall lie against the Company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

"No action shall lie against the company as respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue."

The policy involved in the Finley case was a typical policy of indemnity, and fairly drawn to indicate its character as such. The policies which in other cases have been held to be policies of indemnity resembled it closely. But it was very different from the policy here in suit. By the policy in the Finley case the company agreed to indemnify the assured against loss from common law or statutory liability for damages suffered. By the policy in the case at bar the company insured Elmo Rock Company against loss and expense arising from claims for damages suffered or alleged to have been suffered. An agreement to indemnify against legal liability for damages actually suffered is a very different thing from an agreement to insure against loss or expense arising from claims for damages suffered or alleged to have been suffered.

By the policy involved in the Finley case the company required the insured to notify it of accident, of claim, and of suit. In the event of suit on account of an accident covered by the policy it agreed to defend or settle the suit at its own cost, unless it should elect to pay to the insured the amount of the policy. By the policy here sued upon the company required notice of accident, and agreed that it would make at its own expense such investigation as it deemed necessary. It required notice of claim, and agreed that at its own expense it would settle or contest the same. It required notice of suit, and agreed that at its own expense it would settle or defend the suit whether groundless or not, making no exception of

suits for damages on account of accidents not covered by the policy, and reserving no right to pay the principal sum of the policy and avoid further expense.

By the policy involved in the Finley case it was provided that no action should lie against the company unless it were brought by the assured himself to reimburse him for a loss actually paid by him. The corresponding clause in the policy here in suit merely provides that no action shall lie unless brought for loss or expense actually sustained and paid. There is no restriction to the effect that the suit must be brought by the assured himself or that the loss must be paid by himself.

As hereinbefore shown, the Sowders judgment was paid by the plaintiff in pursuance of an arrangement to that effect long before made with it by Elmo Rock Company and the defendant. By signing the supersedeas appeal bond, the plaintiff agreed that if Elmo Rock Company or the defendant did not pay the judgment in the Sowders case in the event of its affirmance, the plaintiff would pay it. By signing the supersedeas appeal bond as principal and accepting the plaintiff's signature thereof as surety, Elmo Rock Company authorized and requested the plaintiff to pay the Sowders judgment, if it should not be otherwise paid, and agreed to reimburse the plaintiff for any sum so expended by it. In contemplation of law a man does what he causes to be done. Therefore, so far as all parties except themselves were concerned, when Elmo Rock Company caused the plaintiff to pay the Sowders judgment, Elmo Rock Company paid the judgment. We think this would be sufficient even if the language of the policy in suit were like that of the policy involved in the Finley case. Certainly it seems sufficient to meet the requirement of the provision of the policy in suit that the present action shall be brought for loss or expense actually sustained and paid, without a stipulation that it shall be brought by the insured himself for loss paid by himself. This proposition is abundantly sustained by the authorities. As will be observed in reading the cases below cited, courts generally have been indisposed to help liability companies in slipping out of their obligations by means of clauses analogous to that now under consideration, and have been very liberal in interpreting such clauses with reference to the matter of what constitutes payment that will entitle the assured to recover from the liability company.

Power Co., 85 C. C. A. 106, 157 Fed. 514; *Bowron v. Georgia Casualty Co.*, 223 Fed. 673; *Kennedy v. Fidelity & Casualty Co.*, 100 Minn. 1, 110 N. W. 97; *Seattle & S. F. Ry. & Nav. Co. v. Maryland Casualty Co.*, 50 Wash. 44, 96 Pac. 509; *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 73 Wash. 631, 132 Pac. 393; *Herbophosa Co. v. Philadelphia Casualty Co.*, 34 R. I. 567, 84 Atl. 1093; *West Riverside Coal Co. v. Maryland Casualty Co.*, 155 Iowa 161, 135 N. W. 414.

New Omaha Thompson-Houston Electric Light Company had a policy of liability insurance issued by Maryland Casualty Company, and was sued for damages resulting from an accident occurring while the policy was in force. In this suit judgment was rendered against the company January 3, 1902, for \$5,000, and affirmed by the supreme court April 22, 1903. A rehearing having been granted, the judgment was again affirmed by the supreme court June 8, 1905. Between the two dates last mentioned the electric light company transferred all its assets, liabilities and business to Omaha Electric Light & Power Company. In pursuance of its contract of assumption of the liabilities of the electric light company first mentioned, Omaha Electric Light & Power Company paid the judgment for damages July 21, 1905, and later brought suit against Maryland Casualty Company to recover upon the liability policy. The casualty company defended upon the ground that the policy had been assigned without its consent and that it had no contract with the plaintiff, and upon the ground that the electric light company which it had insured had not itself paid the judgment debt. Among others the policy then in suit contained the following provisions:

"Any assignment of interest under this policy shall be void unless the written consent of the company is endorsed hereon by one of its officers.

"No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The court will observe that the questions raised in the case at bar were raised in that case, upon facts less favorable to the plaintiff than those with which we now are dealing, and under policy provisions practically identical with those of the policy involved in the Finley case. The circuit court of ap-



peals for the eighth circuit (Van Devanter, Adams and Riner), speaking through Circuit Judge Adams, said:

"Do the first and second provisions of the policy above set forth defeat plaintiff's right to recover as assignee or successor of the Thompson Company, the assured named in the policy? The provisions referred to avoid the policy in the event of its assignment without the written consent of the insurer and declare that no action to recover on the policy shall lie against the insurer unless brought by the assured himself to reimburse him for loss actually sustained in the payment of a final judgment on the merits. The assignment in question was made after the assured sustained the loss and after it had been adjudged to be a legal liability against it. Dent had been insured. His administratrix had instituted suit and had prosecuted it to final judgment against the assured before the latter transferred its claim against the insurer for reimbursement, to the plaintiff. At that time the term of the policy had expired, and the character of the assured for integrity and prudence, on the strength of which the insurer might have relied in making its contract, could no longer affect its liability. The recognized reasons for the prohibition of assignments without the consent of the insurer had ceased. Its liability had become fixed, and like any other chose in action was assignable regardless of the conditions of the policy in question. This is settled by the great weight of authority (citations omitted).

"In view of this conclusion the other contention of the defendant, based on the provision of the policy, to the effect that no action can be maintained against the insurer except by the assured after satisfaction by it of a judgment rendered against it, requires little consideration. On familiar principles the assignee stands in the shoes of the assignor, and must perform all the conditions precedent to recovery which the assignor was required to perform. The plain meaning of the provision in question, taken in connection with the established assignability of the claim to the plaintiff, is that to render defendant liable on the contract there must have been a loss to the assured, that loss must have been fixed by a final judgment, and that judgment must have been paid in order to constitute a loss within the terms of the policy. Such is the substance and meaning of the contract. Whether the loss is actually paid directly by the hand of the assured, or by some assignee of the claim for indemnity who, for value received from the assured, has assumed the judgment liability, is immaterial. '*Qui facit per alium facit per se.*' The plaintiff paid the judgment against the assured as part consideration for a transfer of its assets, and that was payment by the assured within the purview of the policy (citation omitted). There is no impeachment of the good faith of the transfer or of the sufficiency of the consideration for the assumption of the judgment debt by the plaintiff. We entertain no doubt



that the case shows such a loss to the assured as within the true interpretation of the policy entitles its assignee to recover on the indemnity contract." *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 85 C. C. A. 106, 157 Fed. 514.

Bowron, as trustee in bankruptcy of Southern Iron & Steel Company, obtained from Georgia Casualty Company a policy of employer's liability insurance in his favor, which was conceded to be merely a contract of indemnity against loss, and not a contract of insurance against liability. He sold the assets of the estate to persons who assumed his liability to employees for personal injuries. These buyers transferred their contract of purchase to Standard Steel Company with assumption of such liability, and Bowron conveyed the assets directly to that company. Thereafter Standard Steel Company conveyed the property to Gulf States Steel Company with a third assumption of liability. In the meantime Sibert recovered against Bowron, as trustee, a judgment for \$5,000 for injuries received while in Bowron's employ. In pursuance of its contract of assumption of liability Gulf States Steel Company gave to Bowron its check for the amount of the judgment, and he endorsed the check over to the clerk of the court in payment thereof. Then he sued the casualty company on the policy of liability insurance for the benefit of Gulf States Steel Company. The casualty company in that case claimed, as does the one defending the case at bar, that it had contracted only to reimburse Bowron for a loss actually sustained and paid by him, and that there had been no such loss, inasmuch as the judgment had been paid by Gulf States Steel Company in pursuance of its obligation to do so and to hold Bowron harmless against the same. That was a much stronger situation from the point of view of the defendant than the one with which this court has now to deal. The court thought that the necessary tendency of a requirement that the purchaser assume the liability of the trustee for injuries to his employees would be to lessen the cash price offered for the assets, and that on the other hand the presence of the liability policy among the assets would have a tendency to counter-balance this requirement, and to increase the price offered for the assets to their normal value unaffected by the requirement of assumption of liability; and so the court held that Gulf States Steel Company was justly entitled to the benefit of the

policy of liability insurance, and that payment made in this way satisfied the terms of the policy. The court said:

"It seems clear that the tendency of such a stipulation would be to induce the bidder to bid less because of it. Nor does it seem that the exact amount of the liability assumed would have to be known to the purchasers at the time of their bid to make the principle applicable, though, if it were not ascertained, it might be difficult or impossible to show the extent to which the assumption affected the bid. Loss to the creditors would be presumed from an onerous stipulation imposed on the bidders.\*\*\*\* In this case, however, there was an outstanding indemnity against loss from injury to employees of the trustee during operation, at the time the purchasers bought the assets; i. e., the policy issued to the trustee by the defendant, on which this suit is brought. The purchasers were, therefore, when bidding, confronted on the one hand with the liability they were required to assume, and, as against it, the indemnity held by the trustee as against a loss on that account. In making their bid they would be affected by the nature of the liability, and also by the character of the indemnity against it, if they considered the indemnity available to them, as I think the record shows they were justified in doing. \*\*\*\* As I see it, the loss is not eliminated by the order of sale, but is merely transferred from the trustee to the purchasers. The defendant's agreement was to indemnify against loss on account of the accident, and, as long as the loss remains, it would seem to be immaterial to the defendant whether the loss was paid to the plaintiff for the use of the creditors, or for the use of the Gulf States Steel Company, as the successors of the purchasers who had assumed it. It cannot be presumed that the court, by its order, intended to separate the indemnity from the loss, and so make it totally unavailable, though the loss still remained unsatisfied. The presumption would rather be that the court intended the right to avail of the indemnity to follow the loss, and so, by its tendency to increase the bid, to preserve its value to the estate, which had paid the premium for the protection afforded by it. This would be accomplished by subrogating the Gulf States Steel Company to the rights of the trustee under the policy after it had paid the judgment.\*\*\*\* For this reason it seems to me that the original purchasers, having presumably saved the estate a loss in the price realized for the assets by the trustee at the sale by bidding without deduction for the assumption exacted of them, in reliance of being accorded the benefit of the protection afforded by the indemnity held by the trustee against the assumed liability, ought to be subrogated to the right of the trustee to claim a loss sustained by the accident to Sibert, and which they had assumed, in a sense that would sustain this action by the trustee against the defendant, though the recovery be, and I have no doubt is, for the benefit of the Gulf States Steel Company. The judgment

having been paid in fact directly by the trustee to the clerk of this court, in view of the conclusion I have reached, it is immaterial whether the money was furnished the trustee by the Gulf States Steel Company as a loan or under its obligation to take care of the judgment." *Bowron v. Georgia Casualty Co.*, 223 Fed. 673.

In *Herbo-Phosa Company v. Philadelphia Casualty Company*, above cited, the supreme court of Rhode Island held sufficient a payment accomplished in this wise. The judgment debtor gave his note to a bank for money with which he discharged the judgment, and which the judgment creditor immediately deposited in the same bank, taking therefor a certificate of deposit which was pledged to the bank as security for the note, all this being done as a single transaction.

In *Taxicab Motor Company v. Pacific Coast Casualty Company*, above cited, the supreme court of Washington held sufficient to entitle the insured to maintain its action against the liability company, a satisfaction of the judgment procured by the giving by the judgment debtor of its promissory note for the amount of the judgment with interest to the judgment creditor. Thereby the judgment creditor released a higher form of security upon receipt of a lower form of security for the same amount. The defendant in that case was the same as in this, but from its point of view the provisions of the contract there sued upon were much stronger than those of the policy now in suit.

### AMOUNT OF JUDGMENT.

#### PROPOSITION.

The judgment of the court below should not be disturbed upon the ground that it is excessive.

#### Statement.

The judgment includes interest upon the *Sowders* judgment pending the appeal therefrom. The decisions are not in harmony upon the question whether such a recovery is proper in a suit upon a liability policy of the common form. We think it is proper in the present case. But whether it is so is a question not presented to this court because there is no assignment of error attacking the judgment upon the ground that it is excessive. We say this merely because the question is one



that naturally would occur to the court in its consideration of the case, and might cause it unnecessary trouble.

## DEFENDANT'S CRITICISMS OF THE COURT'S PROCEDURE AND FINDINGS.

### MOTION FOR NEW TRIAL.

#### PROPOSITION.

The court will not consider the matters urged under the nineteenth assignment of error.

#### Statement.

The nineteenth assignment of error (Tr., 212-218) begins as follows, and then proceeds with nineteen paragraphs specifying as many particulars in which it is claimed that the findings of the trial judge were not justified by the evidence.

"The court erred in overruling and denying defendant's petition for a new trial in said action, to which ruling the defendant then and there duly excepted. And defendant now specifies the particulars in which the evidence was insufficient to justify the decision of the court, as follows."

The transcript does not contain the motion for a new trial, or the order overruling such motion, or any bill of exception relating thereto.

#### Argument.

The court will not consider the nineteenth assignment of error or any of the matters therein specified, for three reasons.

(1) While nineteen separate complaints are made of the findings of the trial judge, they all are presented as specifications of reasons why the court erred in overruling the defendant's motion for a new trial, such ruling constituting alone the gravamen of the assignment. Except for this assignment there is nothing in the transcript that shows that any such motion was made, and of course therefore, nothing that shows the contents of such motion, or that it was overruled by the court, or that exception was taken to the court's action. If otherwise proper to do so, the court would not consider an assignment of error based upon the overruling of a motion for new trial in such a state of the record.

(2) Under the federal practice the action of the trial



court in overruling a motion for a new trial is not assignable as error.

Henderson v. Moore, 5 Cranch 11; Pomeroy's Lessee v. Bank of Indiana, 1 Wall. 592; Roemer v. Bernheim, 132 U. S. 103; New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18 (22); Conboy v. First National Bank, 203 U. S. 141 (145).

(3) Possibly an assignment that the court erred in overruling a motion for a new trial, based upon the proposition that the evidence was insufficient to support the judgment, might be treated as an assignment that the judgment was without support in the evidence. But such a practice could not properly be applied to an assignment that the court erred in overruling a motion for a new trial, based upon nineteen separate specifications of the insufficiency of the evidence to support particular findings, there being no specification that the evidence was insufficient to support the judgment itself. This court's rule 11 provides that the assignment of errors "shall set out separately and particularly each error asserted and intended to be urged," and that "errors not assigned according to this rule will be disregarded" except that the court "may notice a plain error not assigned."

As a matter of fact, each of the findings complained of not only was supported by evidence obviously sufficient to sustain it, but was correct. We do not enter now upon a discussion of the details, because for the reasons given we do not think any question of this character is presented by the record.

## ELECTION OF CAUSE OF ACTION.

### PROPOSITION.

Only one cause of action is set up in the complaint.

### Statement.

The first assignment of error (Tr., 189-190) complains of the refusal of the court to compel the plaintiff to elect between causes of action said to be three in number, but of which only two were mentioned in the motion. The motion was to require the plaintiff to say whether it was suing as assignee of the policy by virtue of the assignment thereof made by the receiver of Elmo Rock Company, or was proceeding on the theory that as surety it was entitled to be subrogated to the

rights of Elmo Rock Company. The court held that there was no occasion for requiring such an election.

### Argument.

The complaint (Tr., 1-12) simply set out all the facts and prayed for judgment against the defendant for the amount which the plaintiff had paid in satisfaction of the Sowders judgment, together with interest thereon and an additional sum of \$5 as protest fees. Its single cause of action was its right to recover this sum: *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82. A theory of a case is not a cause of action. The plaintiff's claim was that by virtue of all the facts it was entitled to recover this sum of money. Among the facts set out in this complaint was the authorization and pursuant execution of an assignment of the policy of liability insurance by the receiver to the plaintiff. Not a word was said in the complaint about subrogation. In the assignment, a copy of which was attached as exhibit J to the complaint (Tr., 34-37), it was recited as one of the inducements to the assignment that the plaintiff was subrogated to all the securities held by Elmo Rock Company for the payment of the indebtedness represented by the Sowders judgment, and that the policy was such a security. The plaintiff's right to be subrogated to the policy induced, and was merged in, the assignment of the policy. Certainly there was here no cause for ordering an election.

### RULINGS ON EVIDENCE.

#### PROPOSITION.

The rulings on evidence of which complaint is made in assignments Nos. 2 to 16, inclusive, were correct.

#### Statement and Argument.

1. In taking the deposition of A. G. Wynne *de bene esse*, the witness, who was attorney for the plaintiff in the Sowders case, was asked what steps he took after the filing of the mandate for the collection of the judgment. At the trial the defendant objected to this as calling for secondary evidence, and the court overruled the objection. It does not appear that any such objection, or any objection at all, was made by the defendant's counsel representing it in the taking of the depo-

sition. This ruling forms the subject of the second assignment (Tr., 90-91, 190-191).

An objection to a remediable irregularity in the examination of a witness *de bene esse* participated in by the objecting party comes too late when made for the first time upon the trial. Within this rule are all such objections as that a question is leading, an answer is irresponsive, that a memorandum used to refresh the memory of the witness was not properly produced and qualified, that a suitable predicate was not laid for the introduction of secondary evidence, and all the numerous objections which if seasonably made could be easily remedied, but which are based upon rules of evidence, a strict compliance with which consumes time, adds to expense, is useless in most cases, and is constantly waived by common consent of counsel examining witnesses when there is no reason to suspect lack of frankness or any other impropriety. If a litigant wishes to insist upon strict compliance with such rules he must do so while the examination is in progress, and not wait until it is too late to cure the objections.

York Company v. Central R. R., 3 Wall. 107 (113); Blackburn v. Crawfords, 3 Wall. 175 (191); Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199 (205); *In re Thomas*, 35 Fed. 822; Bird v. Halsy, 87 Fed. 672; Samuel Bros. & Co. v. Hostetter Co., 118 Fed. 257, 55 C. C. A. 111; Smith v. Williams, 38 Miss. 48 (57); Rowe v. Godfrey, 16 Me. 128; Glasgow v. Ridgeley, 11 Mo. 34 (38, 40); Willey v. Portsmouth, 35 N. H. 303 (307); Hutchinson v. Bambas, 249 Ill. 624, 94 N. E. 987; Sheeler v. Speer, 3 Binney (Pa.) 130.

The ruling complained of was correct, because the steps taken by Sowders' attorney for the collection of his judgment did not, or might not, consist wholly of matters of record; and so far as they did consist of matters of record, it was proper to have him state what they were in order that suitable evidence might be procured regarding them and identified by his testimony.

2. To the question above mentioned the witness answered: "I applied to the firm of Meador & Davis, at Dallas, Texas, in person and by letter. They stated to me that their client would pay the money and it would come forward in a few days." No objection appears to have been made to this



at the taking of the deposition. At the trial the defendant moved to strike out the last sentence of the answer on the ground that it was hearsay evidence. The court overruled the motion, and this ruling is complained of in the third assignment (Tr., 90-91, 191). The testimony given was not subject to that objection. It was that Sowders' attorney applied to Meador & Davis in person and by letter regarding the payment of the judgment, and they stated that their client would pay the money and it would come forward in a few days. That is not a statement that their client said it would pay the money, but a statement by attorneys as to what their principal would do.

3. In the same deposition Wynne testified that his firm and Sowders and a bank assigned the Sowders judgment to the plaintiff. The defendant moved to strike out this statement as immaterial, irrelevant and incompetent, and not within the issue of the case, and the court denied the motion. Of this complaint is made in the fourth assignment (Tr., 93-94, 191-192). Testimony that the owners of the Sowders judgment assigned it to the plaintiff was not immaterial, irrelevant and incompetent, and without the issue of the case, because by such assignment the execution lien securing the judgment was kept alive in favor of the plaintiff and the loss on account of the Sowders judgment more effectually brought home to Elmo Rock Company.

4. In taking the deposition *de bene esse* of C. M. Crumbaugh, attorney for Elmo Rock Company and its receiver, the witness was asked what he knew about the proceedings connected with the payment of the Sowders judgment in so far as Elmo Rock Company and its receiver were concerned. It does not appear that any objection was made to this when the deposition was taken. Upon the trial the defendant objected to the question upon the ground that the record was the best evidence. The court overruled the objection, and of such ruling complaint is made in the fifth assignment (Tr., 100-101, 192-193). The objection was overruled by the court on the ground that the matter would not necessarily be matter of record, which was a sufficient reason. In addition the objection came too late when made upon the trial for the first time; and it was proper to have a statement from the attorney, not of the contents of records or of written instruments, but of the steps taken, so that suitable record evidence could be



obtained, if desired, and be properly connected with the proceedings. The answer given in response was merely of this character.

5. In answer to the question above mentioned, the witness stated in a summary way that certain proceedings were had in connection with the Sowders judgment. The details of all those proceedings were shown by certified copies of the record. The defendant moved "to strike out the portion of the answer which deals with matters of record, as not the best evidence." The court denied the motion, and thereof the defendant complains in the sixth assignment (Tr., 101-102, 193-195, 164-172, 154-164, 172-183). The witness was not undertaking to give the contents of records, but merely to show what steps were taken. The witness having shown this, the details were exhibited to the court by certified copies.

6. In the same deposition the witness Crumbaugh was asked regarding a conference between himself, the district judge and a representative of the law firm of Locke & Locke, attending the conference in behalf of the plaintiff, and regarding the understanding of the parties to that conference. By the question and his answer the witness testified that it was understood by the parties to the conference that the plaintiff was to pay the Sowders judgment in behalf of the Elmo Rock Company because it was surety on the supersedeas bond, and that it desired a transfer of the policy in consideration of such payment. No objection appears to have been made to this examination at the time of the taking of the deposition. On the trial the defendant objected to the question because it was not proper redirect examination, and because it was immaterial, irrelevant and incompetent, and because the policy was not so assignable as to render it the basis of an action in behalf of the plaintiff. The court overruled the objection. This ruling is the subject of the seventh assignment of error (Tr., 105-106, 195-196). This evidence was not immaterial or irrelevant, because it showed that the assignment subsequently made was made in pursuance of an arrangement antedating the payment of the judgment. That the policy was assignable has been shown on pages 8-9 ante. That the question was not proper on redirect examination is an objection that comes too late. Had it been made at the time of the examination, it could if necessary have been easily cured by

placing the same witness on the stand again, or by making the same proof through another witness.

7. In the deposition *de bene esse* of W. L. Leeds, the witness, who was an agent of the defendant company at the time of the various transactions and signed the policy of liability insurance in its behalf, and who participated in the proceedings relative to the appeal of the Sowders judgment, was asked what, if anything, within his knowledge, was done with reference to the making of a supersedeas bond in the Sowders case. He replied: "We had the bond made by General Bonding & Casualty Company of Dallas, after securing an indemnity bond from the Pacific Coast Casualty Company through the attorneys, Meador & Davis." No objection to this appears to have been made at the time of the taking of the deposition. On the trial the defendant moved to strike out all that part of the answer beginning with "after securing" upon the ground that "there is no authority shown." The court overruled the motion. This is the subject of the eighth assignment of error (Tr., 114-116, 196-197).

This suit is not based upon the indemnity bond, and the plaintiff does not seek to recover upon it. The making of the indemnity bond was merely one of the circumstances which led up to the making of the appeal bond and the incurring of a loss which the plaintiff is entitled to have reimbursed to it. The authority of Davis to sign this bond is only a collateral issue in the case. The bond would be in itself binding upon the defendant if Davis had original authority to execute it, or if having executed it without authority, his act was ratified by the defendant, or if, there being neither original authority nor ratification, the defendant held him out as having authority, and the plaintiff acted upon appearances in good faith and justifiably. The evidence on this collateral issue is mainly circumstantial in character and fragmentary. That which the defendant moved to strike out was one of the fragments. It showed that one of the agents of the defendant understood that the indemnity bond made by Davis was in fact secured from the defendant.

8. In the same deposition the witness Leeds testified without objection as follows: "I think that we were instructed, or we were authorized by J. F. Seinsheimer & Company, at Galveston, to have the bond made for the Pacific

Coast Casualty Company. Of course I am not positive of that, as I would have to refer to the files to see, but my impression now is that we were authorized by J. F. Seinsheimer & Company, of Galveston, to have the bond executed." Upon the trial the defendant moved to strike this answer out "as merely the conjecture of the witness, and not the best evidence." No objection to it had been made at the examination. The court denied the motion, and of this ruling the ninth assignment complains (Tr., 120, 197-198).

The objection was that the testimony was merely the conjecture of the witness and not the best evidence. No objection had been made at the examination. Had it been made then the examination could have been suspended to give the witness an opportunity to examine his files. Moreover, as suggested by the court, the communication between the witness and the defendant's general agents might have taken place otherwise than by letter or telegram. It was perfectly possible that such authority should have been given over the telephone. The testimony was not objectionable upon the ground that it was a mere conjecture of the witness. It is permissible for a witness to testify in such terms regarding matters of memory.

1 Wigmore on Evidence, § 726; 3 Chamberlayne on Evidence, § 1795; 2 Elliott on Evidence, § 827; 1 Greenleaf on Evidence (15th ed.), § 440; 5 Jones on Evidence, §816.

9. In taking the deposition *de bene esse* of John B. Stephenson, president of the plaintiff company, the witness was asked: "Please state as nearly as you can remember them, the negotiations that led up to the making of that bond. Give the history of the transaction." He answered: "Mr. Davis, of the firm of Meador & Davis, telephoned us that he would like to have us execute the bond as surety, and he asked me if we would be in the office and discuss the matter with him. On this, or the next day—perhaps it was the next day—Davis came over to the office with the form of bond he wanted executed, and stated that there would be no liability to our company, that the case would be taken care of in the event it was affirmed, and under those representations we signed the bond." No objection was made to this at the time of taking the deposition. On the trial the plaintiff objected to the ques-



tion, and that objection having been overruled it moved to strike out the answer "as immaterial, irrelevant and incompetent, no proper foundation for the introduction of such evidence being laid, it not being shown that Mr. Davis was anything other than representing the Pacific Coast Casualty Company in the defense of this damage suit," and having no authority to bind his client by entering into an agreement for an appeal bond. The court denied the motion, and this forms the subject matter of the tenth assignment of error (Tr., 121-122, 198-200). The testimony was merely a statement of what occurred. Whether it was binding upon the defendant was another question, and as to that question the evidence was in conflict. In such circumstances it could not be improper to show what took place, leaving open for determination upon all the evidence in the case the effect of that which took place.

10. In the same deposition the witness was asked in whose behalf Davis represented himself to be acting in applying to the witness for the execution of the supersedeas bond. No objection was made at the time of taking the deposition, but on the trial the defendant renewed to this question the same objection that it had made to the question last above mentioned. The court overruled the objection and this ruling forms the subject of the eleventh assignment of error (Tr., 123, 200-201).

The declaration of Davis that he was authorized by the defendant to act for it of course would not be evidence of his authority. But whether he had authority to act for the defendant was an entirely different question from the one whether he claimed to be acting for the defendant. The defendant would not be bound unless Davis in truth acted in its behalf, or unless he had authority so to act. For instance, if he had had undisputed authority to act for the defendant, but made the application in behalf of Elmo Rock Company alone, the defendant would be in no wise bound by the transaction. In so far as it was material to show that the indemnity bond and the procurement of the appeal bond were acts of the defendant, it was necessary that the plaintiff show both these elements, and the question to which objection was made was directed to one of the elements.

11. In the same deposition the witness was asked whether he was familiar with the usages and practices at



Dallas, and in the state of Texas, with regard to the procurement by attorneys at law of the execution by surety companies of appeal bonds for their clients, and having answered that he was, he was asked what was the practice in that regard. To this the defendant objected on the trial as being immaterial, irrelevant and incompetent, and not binding upon the defendant in any manner. The court at first sustained the objection, but having heard the answer and the next question and answer, the ruling was withdrawn and all the testimony was admitted. The testimony was to the effect that such matters usually were taken up with the plaintiff by the appealing company's attorney, and that the witness did not remember having executed an appeal bond in which the appealing company took the matter up with the plaintiff directly, and that so far as he knew such was the general usage in the offices of other companies in his locality. The defendant renewed its objection to all the testimony. The action of the court in admitting this testimony is the subject of the twelfth and thirteenth assignments of error (Tr., 123-124, 201-203).

If the defendant held Davis out as its agent having authority to procure the appeal bond and to make the usual contract of indemnity against loss on account thereof, and if the plaintiff acted in good faith and otherwise justifiably upon the belief that Davis had the authority which he was made to appear to have, the defendant is bound by the act of Davis, even though Davis may have acted contrary to his private instructions. A corporate principal which sends out an agent to act for it in a particular matter thereby holds him out as having the authority which at the time and in the place it is usual for such agent to possess with regard to such matters, and secret instructions contrary to the usual customs of the business as carried on in that place will not exonerate the principal from responsibility for the agent's acts. Therefore what those customs are is always a pertinent inquiry in such a case. The complaint alleges (Tr., 5-7) that Davis had actual authority in advance, that the defendant ratified his action, and that "the defendant held out the said John Davis to the plaintiff as having authority to deal with it in the usual course of business with reference to the matter of obtaining from it the execution of such supersedeas appeal bond and indemnifying the plaintiff against loss thereby incurred, and the plaintiff without notice of any defect in the authority of

the said John Davis dealt with him in the usual course of business and in reliance upon the authority which he apparently possessed, and executed said supersedeas appeal bond in consideration of the making of said contract of indemnity." The testimony objected to was directed to the proof of this last allegation.

12. In the same deposition the witness was asked to state what, if any, information he had at the time of executing the appeal bond concerning the extent and nature of the authority of Davis to represent the defendant in the matter of getting the supersedeas appeal bond. The answer was: "We understood he had full authority to act for the Pacific Coast Casualty Company in the matter of procuring a surety on the proposed appeal bond." No objection was made either to the question or to the answer at the time of taking the deposition. On the trial the defendant objected to the question "as immaterial, irrelevant and incompetent." The court having overruled the objection and the answer having been read, the defendant moved to strike it out as irresponsible, and as stating the conclusion of the witness rather than his information. The court does not appear to have ruled expressly upon this motion. The fourteenth assignment of error complains of the overruling of the objection to the question (Tr., 124-125, 204-205).

The objection was that information sought by the question was immaterial, irrelevant and incompetent. Obviously it was not so. Davis had testified that he showed Stephenson a letter in which he was instructed by the defendant that the Elmo Rock Company must make its own supersedeas bond. The witness answered that he understood that Davis had full authority in the matter. The defendant moved to strike this out as irresponsible, which objection came too late, and as stating the conclusion of the witness rather than his information, which objection also came too late. Moreover, the statement of the witness as to what he understood evidently was merely his way of stating that he had no information to the contrary.

13. In the same deposition the witness was asked: "Was the matter of his authority discussed between you?" Upon the trial the defendant objected to this question "as immaterial, irrelevant and incompetent, and no foundation laid." The court overruled the objection, and the witness gave an

answer to which no separate objection was made on the trial; and none was made to any part of the colloquy at the time of taking the deposition. The overruling of this objection is the subject of the fifteenth assignment of error (Tr., 125-126, 205-206).

As above stated, Davis had testified that he showed Stephenson a letter instructing him that Elmo Rock Company must make its own supersedeas bond. The question was pertinent to the issue whether the plaintiff had acted in good faith upon the apparent authority of Davis, and was pertinent to the testimony upon that issue given by Davis.

14. After the depositions of Davis and Stephenson had been read, the plaintiff offered in evidence the original indemnity agreement signed by Davis, a copy of which constitutes exhibit D to the complaint. The defendant objected "to the introduction of that paper upon the ground that it affirmatively appears that Mr. Davis did not have authority to sign that as attorney in fact of the Pacific Coast Casualty Company." The court admitted the paper subject to the objection. Afterward the court found as matters of fact that Davis called on the president of the plaintiff company, and obtained from it the supersedeas appeal bond, and as an inducement to the issuance thereof gave to it the indemnity contract, and that Stephenson, the president, who acted for the plaintiff company in the matter, was not shown the defendant company's letter of June 28, 1912, to its attorneys, and was not in any way made aware of any limitations upon the authority of Davis, and dealt with him in the supposition that his authority was that which was usual in such cases and was apparently possessed by him, and that both Davis and Leeds knew of the transaction with Stephenson and of the giving of the indemnity contract. The admission of this paper forms the subject of the sixteenth assignment of error (Tr., 149-151, 206-208, 76-78).

Whether Davis had authority to execute the paper was a disputed question in the evidence, and the paper itself was clearly admissible in such circumstances. The execution of this paper was an important link in the chain of circumstances by which the plaintiff was drawn into the loss of its money that it now seeks to recover. The plaintiff is not suing upon the indemnity contract, but it exhibits to the court the contract and the circumstances attending its execution, in order

to show how it happened that it became interested in this matter, and became entitled to recover from the defendant the amount of its loss.

### CONCLUSION.

From the foregoing it appears that justice will be done, and that the law will be satisfied even to its minutest regulation of procedure, if the judgment of the district court be allowed to stand; and accordingly the defendant in error prays that the same be in all things affirmed.

Respectfully submitted,

R. S. GRAY,

MAURICE E. LOCKE,

EUGENE P. LOCKE,

*Counsel for Defendant in Error.*

Dallas, Texas, May 3, 1916.





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No. 2735.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT, AT SAN FRANCISCO.

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PACIFIC COAST CASUALTY COMPANY,  
*Plaintiff in Error,*

v.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,  
*Defendant in Error.*

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Upon Writ of Error to the District Court of the United States  
for the Northern District of California, Second  
Division, at San Francisco.

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Supplemental Brief for Defendant in Error.

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*Attorneys for Defendant in Error.*



# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

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PACIFIC COAST CASUALTY COMPANY

v.

GENERAL BONDING & CASUALTY INSURANCE  
COMPANY

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} No. 2735.

Supplemental Brief for Defendant in Error.

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### Introductory.

Since our original brief of May 3, 1916, was printed and sent to San Francisco for filing we have received the brief of counsel for the plaintiff in error, and in this supplemental brief we shall make direct reply thereto in paragraphs so headed as to indicate the portion of the brief under consideration in each paragraph. In printing the original brief, we overlooked the rule of this court relative to style of type, and printed it in our usual way. We trust the court will excuse this oversight.

### Page 8.

In the second paragraph on this page it is stated that the Sowders judgment was paid by the defendant in error October 22, 1913, and that the assignment of the policy in suit was dated November 4, 1913. This is true, but it is also true that the assignment was made in pursuance of an understanding that antedated the payment of the judgment (Tr., 105-106).



**Pages 9-10 and 37-39.**

As shown on pages 20-21 of our original brief, this case is prosecuted upon a single cause of action, namely, that in view of all the circumstances the plaintiff is entitled to recover from the defendant, on the policy in suit, the sum of money against whose loss the defendant promised insurance. The plaintiff is not suing upon the indemnity agreement executed by Davis in behalf of the defendant, or upon any right resting on subrogation. In the opinion of the district court of Kaufman County, Texas, the plaintiff was entitled to be subrogated to the policy in suit, and therefore it ordered that the policy be assigned to the plaintiff; but the plaintiff's rights of subrogation are merged in the assignment, and are not in question in this case.

**Page 10**

The second specification of error is answered on pages 21-23 of our original brief.

**Page 11.**

The matter complained of in the third specification was not mentioned by the defendant in its assignment of errors, and therefore is not before this court for consideration (Tr., 188-218; rule 11). Moreover the court did not err in overruling the defendant's objection to the letter offered. It was read into the record in response to the defendant's objection to oral testimony of its contents and request that it be produced; and it had the effect of modifying the testimony of the witness. Its introduction was beneficial and not harmful to the defendant.

**Pages 11-12.**

The matter complained of in the fourth specification is also matter not assigned as error, and therefore not before the court. But the objection is not well taken. The letter was written by Mr. Davis, who had been attorney for the defendant in the Sowders case, and who was communicating to the attorneys for the plaintiff in the Sowders case the refusal of the defendant to pay the judgment. It is undisputed that the defendant did refuse to pay the judgment, and there is no denial of its having announced such refusal to its attorney for the purpose of having the same communicated to Sowders.

**Page 13.**

The fifth specification is answered on page 23 of our original brief, in the paragraph numbered 3.

**Page 13.**

The matter complained of in the sixth specification was not assigned as error. The testimony objected to was of the same character as that dealt with in the fifth specification, and so the complaint is answered by paragraph 3 on page 23 of our original brief.

**Pages 14-15.**

The seventh specification embraces the matters included in the fifth and sixth assignments of error, and is answered on pages 23-24 of our original brief.

**Pages 16-17.**

The ninth specification is answered on page 25 of the original brief.

**Page 18.**

The tenth specification is answered in paragraph 8 on pages 25-26 of our original brief.

**Page 18.**

The eleventh specification is answered on pages 26-27 of our original brief, in paragraph 9.

**Page 20.**

The twelfth specification is answered in paragraph 10 on page 27 of our original brief.

**Pages 20-21.**

The thirteenth and fourteenth specifications are answered together on pages 27-29 of our original brief.

**Page 22.**

The fifteenth specification is answered on page 29 of our original brief, in paragraph 12.

**Page 23.**

The sixteenth specification is answered in paragraph 13 on pages 29-30 of our original brief.

**Page 24.**

The seventeenth specification is a duplicate of the fifteenth.

**Page 24.**

The eighteenth specification is answered in paragraph 14 on pages 30-31 of our original brief.

**Pages 26-28.**

The nineteenth specification is answered on pages 7-9 of our original brief.

**Pages 28-37.**

On pages 28-30, in the twentieth specification, counsel complain of the action of the court in overruling their motion for a peremptory nonsuit. This complaint is set out in their eighteenth assignment of error (Tr., 211-212), and we have dealt with it on pages 7-18 of our original brief. On Pages 30-37 counsel follow this specification of error with a specification of "the particulars in which the evidence was and is insufficient to justify the decision of the court."

These nineteen specifications of particulars, now transferred to the eighteenth assignment of error, relating to the motion for a nonsuit, constitute a part of the nineteenth assignment of error, complaining of the action of the court in overruling a motion for a new trial (Tr., 212-218). As a part of the nineteenth assignment of error we have dealt shortly with them on pages 19-20 of our original brief; but this assignment seems now to be abandoned. Manifestly the district judge was called upon to consider the motion for a nonsuit with reference to the matters therein set up, and to those matters only. If no sufficient reason why the plaintiff should be nonsuited was given in the motion, the district judge did not err in overruling the motion. All these nineteen specifications of particulars relate to findings of fact filed by the court long after the close of the trial, each complaining that some particular real or pretended finding of fact was unsupported by the evidence. Manifestly this has nothing to do with the motion for a nonsuit. We suppose that we might properly stop here; but



perhaps it will be more satisfactory to the court if we call attention to some of the reasons why the complaints made of the findings are not well founded; and we will do this in paragraphs numbered to correspond with the specifications of particulars.

1. The evidence showed conclusively that the defendant's agent Miller-Stemmons Company procured the indemnity contract from the defendant through attorneys Meador & Davis, provided Davis had authority either original or by ratification or by holding out to give the agreement which he did give. The evidence on this subject is stated on pages 2-4 of our original brief, and seems to us sufficient to support the finding of the court upon any one of these three grounds.

2. The only evidence (aside from the letter on page 144 of the transcript, whose recitals are not evidence) regarding the authority of J. F. Seinsheimer & Co. is that they were general agents of the defendant, and that through them the defendant paid the premium of the supersedeas bond by reimbursing Miller-Stemmons Company therefor. Mr. Leeds of the Miller-Stemmons Company testified that he thought he had been authorized by J. F. Seinsheimer & Company to procure the supersedeas bond, and there was no evidence that the defendant ever had communicated either to J. F. Seinsheimer & Co. or to Miller-Stemmons Company its unwillingness to furnish such bond. As we shall show hereafter, it was the duty of the defendant to furnish the bond in protection of its assured, and it was permissible upon the part of both

its general agents and its local agents to assume that the defendant would do its duty. The evidence is fully stated on pages 2-4 of our original brief.

3. The finding complained of is abundantly sustained by the testimony of Leeds that Stephenson agreed to make the supersedeas bond provided an indemnity bond were given by the defendant, and that he procured such a bond through Meador & Davis, and by the testimony of Stephenson that he made the bond on the promise of Davis to furnish an indemnity agreement in pursuance of which promise the agreement shown in the evidence was delivered. This evidence is stated on pages 3-4 of the original brief.

4. The court did not find that Davis was the attorney in fact of the defendant, and nobody except Davis by his signature ever claimed that he was such.

5. The court found that Stephenson was not shown the defendant's letter of June 28, 1912. The evidence presented a direct issue of veracity between Stephenson and Davis on this subject; and the court believed Stephenson and disbelieved Davis.

6. This specification is practically a repetition of the fifth. Stephenson testified that Davis did not tell him that he was without authority to execute an indemnity agreement and did not show him the letter of June 28, 1912. The court believed this testimony, and did not believe the contrary testimony of Davis.

7. Stephenson, testifying with reference to the time when and place where the supersedeas bond was procured, stated that it was customary for attorneys at law to apply for appeal bonds, and that he under-

stood that Davis had authority to do what was done. This is sufficient to sustain the finding of the court that Stephenson dealt with Davis on the supposition that his authority was that which was usual in such cases.

8. The same evidence that sustains the finding complained of in the seventh specification sustains that of which complaint is made in the eighth specification.

9. Leeds testified that he was agent of the defendant at the time the policy sued on was issued; and that the policy was signed by his firm; and that notice of loss was served on him by Sowders and by him communicated to J. F. Seinsheimer & Co., resulting in the defense of the Sowders suit by the defendant; and that he thought he was authorized by J. F. Seinsheimer & Co. to procure the appeal bond; and that he did procure it and pay for it; and that he was reimbursed for the outlay by J. F. Seinsheimer & Co. (Tr., 113-117). The defendant admits (notwithstanding the letter on page 144 of the transcript) that it paid the premium through J. F. Seinsheimer & Co.

10. There is no finding that the company knew that Davis had executed the indemnity agreement, save as the knowledge of Davis and Leeds may be imputed to it. The court did find that Davis and Leeds knew of the transaction, which finding is in accordance with the undisputed evidence. As a matter of law Davis and Leeds are presumed to have communicated this information to the defendant, and there is no evidence that they did not do so.

11. There is no finding of the court that the defendant ratified the giving of the indemnity agreement by Davis. If there had been such a finding it would have been sustained by the evidence that Davis and Leeds, whose information would be imputed to the defendant, knew of the transaction, and that the defendant accepted the benefit of the supersedeas appeal bond, and paid the premium thereon. Having instructed Davis that Elmo Rock Company must furnish its own supersedeas bond, when it was requested to pay the premium for such a bond it necessarily was put upon inquiry as to how and why the bond had been obtained in violation of its instruction.

12. Crumbaugh testified (Tr., 105) that in the conference which took place in the court between himself and the district judge and Mr. Cosnahan it was requested and understood by all the parties that the plaintiff was to pay the Sowders judgment in behalf of Elmo Rock Company, and (Tr., 106) that the plaintiff did finally pay the judgment in behalf of Elmo Rock Company, and (Tr., 105 and 103) that he read very carefully the assignment of the policy and that the recitals therein contained were in accordance with the facts. The assignment recited (Tr., 36) that the plaintiff paid the Sowders judgment at the request of the receiver of Elmo Rock Company, who executed the assignment.

13. The undisputed evidence is that the receiver of Elmo Rock Company, by authority of the court, assigned the policy in suit to the plaintiff; and the indisputable law is that the policy was assignable.



14. The receiver of Elmo Rock Company testified that the property levied upon consisted of land worth \$19,000 and encumbered by a lien of \$3,500, and of personal property worth \$4,000 or \$5,000 (Tr., 108). The court's nineteenth finding of fact follows this evidence.

15. There is no finding that Elmo Rock Company was solvent and able to pay the Sowders judgment. But if there were it would be sustained by the evidence of the receiver (Tr., 108 and 111) that Elmo Rock Company owned nineteen acres of land worth \$19,000 and encumbered for \$3,500, and rock crushing machinery worth \$4,000 or \$5,000, and that its entire indebtedness was possibly \$10,000. This evidence leaves the company solvent, estimating the value of the defendant's indemnity policy as nothing, and assuming that it had no property other than that levied on and the policy.

16. By reason of the Sowders judgment Elmo Rock Company was thrown into the hands of a receiver and its business was stopped, and its property subjected to a lien, and itself to liability for the indemnification of the plaintiff, which paid the Sowders judgment in its behalf. These facts are found by the court; and from them the conclusion follows irresistibly that Elmo Rock Company did suffer loss and expense by reason of the Sowders judgment, though there is no express finding to that effect.

17. What has been said in the last preceding paragraph answers the seventeenth specification.

18. Leeds testified that Miller-Stemmons Company were acting under J. F. Seinsheimer & Co. and that he thought they were authorized by J. F. Seinsheimer & Co., to procure the appeal bond, and that J. F. Seinsheimer & Co. reimbursed them for the premium paid on the appeal bond.

19. There is no finding of fact that it was the duty of the defendant to furnish a supersedeas bond in appealing from the Sowders judgment; but as a matter of law such was its duty.

Brassil v. Maryland Casualty Co., 147 N. Y. App. Div. 815, 133 N. Y. S. 187; same case, affirmed, 210 N. Y. 235, 104 N. E. 622; E. M. Upton Cold Storage Co. v. Pacific Coast Casualty Co., 162 N. Y. App. Div. 842, 147 N. Y. S. 765; Rochester Mining Co. v. Maryland Casualty Co., 143 Mo. App. 555, 128 S. W. 204; American Surety Co. v. Ballman, 104 Fed. 634; same case, affirmed, 53 C. C. A. 152, 115 Fed. 292; Robb v. Security Trust Co., 57 C. C. A. 576, 121 Fed. 460; Rosenbloom v. Maryland Casualty Co., 153 N. Y. App. Div. 23, 137 N. Y. S. 1064.

Twelve of the foregoing nineteen specifications of particulars have to do with matters relevant only to the indemnity agreement executed by Davis in the name of the defendant. The plaintiff is not suing on that indemnity agreement; and it is only of collateral importance as being one of the links in the chain of circumstances leading up to the right of the plaintiff to take an assignment of, and to sue upon, the liability policy issued by the defendant. That right would be

abundantly supported even if the indemnity agreement never had been given, and the validity of the indemnity agreement therefore is by no means an essential element of the plaintiff's case.

### **Pages 39-43.**

It is of no consequence here whether the plaintiff was entitled to be subrogated to the rights of Elmo Rock Company against the defendant. The district judge of Kaufman County thought it was, and so ordered the receiver to transfer the liability policy to the plaintiff. This suit is based upon the assignment of the policy, and not upon an equitable claim thereto by way of subrogation.

### **Pages 43-47.**

This argument upon what the defendant's counsel say is the chief question in the case has been anticipated and answered on pages 9-18 of our original brief.

### **Pages 47-53.**

The plaintiff is not seeking to recover upon the indemnity contract executed by Davis. It set up the contract in its complaint merely as matter of inducement which led it to execute the supersedeas bond and thereby to come into possession of the policy of liability insurance sued upon. The case is not correctly stated. The district court found upon evidence quite sufficient to sustain such finding that the supersedeas bond was executed in ignorance of the limitations placed upon the authority of Davis and in reliance upon his apparent authority. There was no evidence that Davis had a written power of attorney, and no

pretense upon the part of the plaintiff that he was an attorney in fact with authority to execute the indemnity agreement. Our theory as to this collateral matter may be stated as follows.

A principal is bound by the act of his agent not only when such act is within the scope of the agent's theretofore conferred actual authority, but also when another has dealt with the agent in just reliance upon the authority which the principal has caused the agent to appear to have, and also when the agent's act, though originally not authorized either in fact or in appearance, has been ratified by the principal.

With limitations not relevant here, a principal is conclusively presumed to have all the information and all the notice of facts in any way appertaining to a transaction which are possessed by his agent acting for him in that transaction.

The defendant instructed Davis to appeal the Sowders case, but at the same time instructed him that Elmo Rock Company must furnish its own supersedeas appeal bond. By its contract and its action thereunder the defendant had undertaken to defend the Sowders suit at its own expense, and had agreed that the moneys so expended should not be included in the \$5,000 limit of liability fixed by the policy, and had bound Elmo Rock Company not to interfere in the legal proceedings. Under the controlling law, execution on the Sowders judgment could be stayed pending appeal only by filing an approved supersedeas bond within twenty days. The defendant had the right to appeal the case, but it had also the concomitant duty



of protecting Elmo Rock Company from the judgment pending the appeal. Under the contract between them it was the defendant's duty, and not that of Elmo Rock Company, to procure and pay for the supersedeas bond. This, of course, included the obligation to do whatever it might be necessary to do in order to procure such bond. For authorities see page 11, ante.

We submit that when the defendant instructed its agent 2,000 miles away to appeal the Sowders case, it thereby authorized him to do in its behalf what it was under obligation to do, and what it was necessary that it should do in order to render the appeal effective. Its accompanying instruction, which was violative of its own contract, that Elmo Rock Company must furnish the supersedeas bond, should be construed as being merely an instruction to get this advantage for it if possible. To make an effective appeal was the primary and fundamental part of the order. To saddle upon Elmo Rock Company contrary to agreement the responsibility and expense of procuring the supersedeas bond was a secondary and incidental part of the order. That which was primary and fundamental was not nullified by the conflict with it of that which was secondary and incidental. "*Ut res magis valeat quam pereat*" is the rule of interpretation which should be applied even in favor of Davis, and especially in favor of this innocent plaintiff. Upon this ground we contend that Davis had actual authority previously conferred to do all that he did. This court knows, and the trial court knew, that nowadays

appeal bonds usually are made by surety companies upon payment of premium and satisfactory showing of safety, and that ordinarily the attorney at law conducting the litigation acts for his client in obtaining the bond. In this case the evidence shows that such was the regular course of business where and when the transaction in dispute was had. The conflict between Stephenson's testimony and that of Davis having been decided in the plaintiff's favor, we have a case of action in good faith and without notice of secret instructions upon faith of the authority usually possessed, and which therefore the defendant caused Davis to appear to possess. Moreover Leeds, the recognized business agent of the defendant, cooperated with Davis in getting the plaintiff to make the bond, and paid the premium thereon, thus adding to the appearance of regularity in the negotiation.

Davis and Leeds both knew that the plaintiff had made the supersedeas bond, and had done so in consideration of the payment of a premium by the defendant and of the execution by the defendant through Davis of the indemnity agreement. Their knowledge is conclusively imputed to the defendant, whether its officers in San Francisco had or did not have information regarding it as a matter of fact. There is, however, no evidence, (for the letter on page 147 of the transcript is not evidence) that these officers did not receive the immediate and full report which Davis and Leeds ought to have sent them. With such knowledge imputed or actual, or both, the defendant availed itself of the bond made by the plaintiff, prosecuted the appeal

with stay of execution, and paid the premium for the bond. Thereby it ratified the action of Davis and Leeds in procuring the bond, and in procuring it by the means adopted.

Whatever the court may think of Davis' authority to bind the plaintiff by an express contract of indemnity, we believe it cannot doubt that the defendant, through Davis and Leeds and by ratification of their act, not only consented that the plaintiff make the bond, but even induced it to do so, and so in law requested it to pay the judgment in behalf of Elmo Rock Company with right of indemnity from Elmo Rock Company, and of subrogation to and assignment of the judgment, execution lien and employer's liability policy. The plaintiff is no volunteer, no meddler, no speculator in lawsuits. It merely is doing the best it can in a legitimate way to get partly out of the trouble into which it got through the inducement of the defendant.

### **Pages 55-63.**

Here counsel recur to their contention that the plaintiff is not entitled to recover because the Sowders judgment was not so paid as to render the defendant liable. This subject has been sufficiently discussed on pages 9-18 of our original brief.

### **Page 64.**

Leeds was not merely a soliciting agent. The policy in suit was signed by his firm, whose managing

partner he was, and the defendant does not dispute the validity of that policy.

Respectfully submitted,

R. S. Gray,

Maurice E. Locke,

Eugene P. Locke,

Counsel for Defendant in Error.

Dallas, Texas,

May 19, 1916.





4 A  
No. 2735.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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PACIFIC COAST CASUALTY COMPANY, a  
Corporation,  
*Plaintiff in Error,*

vs.

GENERAL BONDING AND CASUALTY IN-  
SURANCE COMPANY, a Corporation,  
*Defendant in Error.*

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**Petition for Rehearing.**

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Filed this.....day of April, 1917.

....., Clerk.

By.....Deputy Clerk.

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The James H. Barry Co.,  
San Francisco

Filed

APR 4 - 1917

F. D. Mendon.

Clerk



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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PACIFIC COAST CASUALTY COMPANY, a corporation,	}	No. 2735
<i>Plaintiff in Error,</i>		
vs.		
GENERAL BONDING AND CASUALTY IN- SURANCE COMPANY, a corporation,	}	
<i>Defendant in Error.</i>		

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PETITION FOR REHEARING.

We respectfully submit the following matters which we believe entitle the plaintiff in error to a rehearing before this Honorable Court:

Certain principles expressed in the opinion of this Court filed on the 5th day of March, 1917, will, if they be the law, materially alter the practice of casualty insurance companies throughout this country. With all due deference to this Honorable Court we believe that further consideration of the points involved herein would lead to a different conclusion.



FIRST: A careful study of the opinion leads us to the conclusion that the issues respecting the authority of John Davis to represent the plaintiff in error as attorney in fact, and the indemnity agreement set out in the complaint, have been practically eliminated from the case, even though there is language in the opinion adverse to the contention of plaintiff in error. The record discloses the fact that Meador & Davis were authorized to take an appeal, but not to furnish a supersedeas bond. That bond was to be obtained by the assured. Of course taking an appeal is quite distinct from the giving of a stay bond as an appeal is consummated when the jurisdiction of the higher court is properly and regularly invoked, and the evidence and legal points involved in the case are presented to the appellate tribunal in the manner required for their proper determination. The appeal might be prosecuted without any stay bond, and for that matter the judgment might be satisfied pending an appeal. The only authority which Davis had was to appeal. The scope of his agency is not left to conjecture as the letter of instructions was introduced in evidence, and is quoted in the opinion itself. This letter of instructions to Davis was delivered by Mr. Davis to Mr. Stephenson, the president of the defendant in error (Record, pages 134, 135, 136). Stephenson admits that he received the letter (Record, page 130). And the letter was actually produced from Stephenson's files when his deposition was taken

(Record, page 126). Stephenson himself testified that he had information that Meador & Davis had a power of attorney, but says that he does not know the extent of their power (Record, pages 125-126). Certainly under the authorities set out in our brief herein, at pages 51 to 53, the defendant in error was charged with the duty of ascertaining the extent of Davis' authority, and was chargeable with knowledge of the limitation placed upon him. The president of the General Bonding and Casualty Insurance Company could not relieve himself from this presumption by mere carelessness in failing to read the letter presented to him, or by neglect to make seasonable inquiry of Davis himself as to what his authority really was in the premises.

With respect to Seinsheimer & Co. it is in evidence that that firm ceased to be the agents of the Pacific Coast Casualty Company prior to July 30, 1912 (Record, page 144), and the indemnity agreement was signed by John Davis August 6, 1912. As to this there is no contradiction in the record, and we feel there is no evidence tending to sustain the opinion of this Honorable court that Leeds was the managing partner of an agent of the plaintiff in error when he came into possession of such knowledge as he may have had respecting the procuring of the supersedeas bond, and the execution by Davis of an indemnity agreement. We believe, therefore, that the finding that the knowledge of Davis and Leeds was to be

imputed to the plaintiff in error is not warranted by the facts of the case. The agency with which Leeds was connected was "confined to the matter of accident insurance, liability insurance, etc." (Record, page 117). Davis was specifically directed that the plaintiff in error would not furnish the supersedeas bond, and we respectfully submit that the knowledge of an agent, or an attorney, who has exceeded his authority, or done that which he was expressly directed not to do, is not imputable to the principal unless direct proof is furnished that said principal was actually conversant with the facts, and the record is entirely silent on the question as to whether or not the Pacific Coast Casualty Company ever knew that Davis had procured the supersedeas bond, or had given the indemnity agreement to the defendant in error.

One element of the case which seems to have had weight with the trial Court was the fact that ultimately the plaintiff in error paid the premium on the supersedeas bond. But this manifestly was done in the ordinary course of business as the policy of insurance originally issued to the Elmo Rock Company bound the plaintiff in error to pay the expense of the litigation, and the premium on the cost bond was merely one item of expense. There is nothing in the record tending to show that at the time the premium was paid the plaintiff in error was aware, or had any reason to believe, that contrary to instructions the bond had been procured in the name of the

plaintiff in error, or an indemnity agreement had been given by John Davis, falsely representing himself to be its attorney in fact. It is the uniform custom of casualty insurance companies to pay the premium upon a bond precisely as they would pay the fees of court reporters, witnesses or jurors, or costs of investigating the case, the charges of experts, and all the other and varied items of expense attendant upon more or less protracted litigation. The premium on a bond on appeal would be considered by the company in the same light as the payment of the cost of printing and filing a transcript or brief. And nowhere does it appear that Davis, Leeds, The Elmo Rock Company, or the defendant in error, ever acquainted the plaintiff in error with the fact that its representative had procured this bond, and that the payment was made on its own account, and not on behalf of the assured. As we have said above, however, the opinion of the Court seems to us to proceed upon another point as there would be no occasion for modification of the amount of the judgment if the indemnity agreement were sustained as a valid contract, and the actions of Leeds and Davis were held to be binding upon the plaintiff in error.

SECOND: We come, therefore, to the two main propositions upon which this Honorable Court seems to place reliance. They are, first, that it was the duty of the plaintiff in error, if it desired to appeal, to



protect the assured by giving a supersedeas bond, and, second, that the policy of insurance issued by the plaintiff in error was assignable after the liability of the assured became established by judgment.

We respectfully urge that the view taken by this Honorable Court upon each of these questions is not correct. It certainly is not in accordance with what we understand to have been the uniform practice of insurance companies in the conduct of their business. We have cited numerous cases in our brief filed herein (pages 54 to 63 inclusive), to show the meaning which the Courts have placed upon a policy of insurance such as the one which is involved in the case at bar. It was not an insurance against liability, but was an insurance against loss sustained and paid by the assured. The agreement was that the Pacific Coast Casualty Company would defend any action brought against the assured, defray the expense thereof, and pay to the assured any amount up to \$5,000.00 that may have been expended by the assured in satisfaction of a final judgment. The very essence of the contract was that the plaintiff in error would indemnify the assured, and would pay after the assured had paid, and only in the event that the assured did sustain loss. While it is true that the Pacific Coast Casualty Company reserved the right to handle the defense, and had full control of an appeal, we submit that a fair construction of the contract would not be that the insurer was also obliged

to furnish a supersedeas bond. In doing so the insurer would be called upon to materially enlarge its original contract as embodied in the policy. Such a rule would place upon the Company the burden of paying the judgment in all events if it were sustained by the Appellate Court. In other words, its original contract that it would pay if the Elmo Rock Company paid, would, under the rule enunciated in the opinion of this Honorable Court, be transformed into a contract that it would pay upon affirmance of the judgment, irrespective of whether the Elmo Rock Company paid or could pay.

To the suggestion made in the Court's opinion that to hold otherwise would leave the assured unprotected pending the appeal, it seems that the clear answer is that if execution is taken out pending the determination of the case upon appeal, and is satisfied by the assured, then to that extent the judgment is a final judgment, paid by the assured, and the assured is clearly entitled to indemnity irrespective of the right still remaining in the insurer to proceed with the appeal if it so desired. See *Upton Cold Storage Company vs. Pacific Coast Casualty Company*, 162 N. Y. App. Div., 842.

The purpose of this form of insurance being to protect the property of the assured, it has often happened that the insurance companies were not called upon to pay a judgment against the assured because such assured was itself bankrupt, and unable to re-

spond in damages. And as the contract is one between the company and the assured it is but right, in our opinion, that the insurance company should stand upon the exact terms thereof, and avail itself of the saving which often results from such a situation. This contingency is taken into consideration in the fixing of the rates charged for the insurance itself, and as a policy such as the one given the Elmo Rock Company is a contract for the benefit and protection of the employer, and not the injured workingman, we see no sound reason why the interpretation placed upon it by insurance companies generally is not a correct and fair one. If the policy were in the first place one for the benefit of the workingman it would come under what is known as workingmen's collective insurance, and not employer's liability insurance. It would partake more of the nature of accident insurance, and the rate charged therefor would be greatly increased.

We feel, therefore, that the opinion of this Honorable Court holding that the insurer is obligated to protect the assured by furnishing a supersedeas bond is erroneous. Similar considerations underlie our contention supported by cases cited, that the policy of insurance was nonassignable until after payment by the assured. The Elmo Rock Company never paid this loss; it never became entitled to any reimbursement from the insurer and we respectfully urge that the condition requiring payment of the judg-

ment is a condition precedent, and that where the assured has not actually made the payment there is no right of action whatsoever upon the policy (See condition L, Record, page 73).

We have set out the authorities upon which we rely at considerable length in the briefs filed herein, and have not repeated them in this petition as we feel that it would merely encumber the record, but we respectfully urge that the decision of this Honorable Court marks so serious a departure from the general understanding and practice existing in insurance circles that it should be further considered upon rehearing herein, and we believe that upon further reflection this Honorable Court would reach an entirely different conclusion.

Respectfully submitted.

MYRICK & DEERING,  
JAMES WALTER SCOTT,  
Attorneys for Plaintiff in Error.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

JAMES WALTER SCOTT,  
Attorney for Plaintiff in Error.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

TACOMA RAILWAY AND POWER COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

WILLIAM COTHARY and MARGARET COTH-  
ARY, Husband and Wife,

Defendants in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District  
Court of the Western District of Washington,  
Southern Division.

---

**Filed**

MAR 3 - 1916

**F. D. Monckton,**  
**Clerk,**



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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TACOMA RAILWAY AND POWER COMPANY,  
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Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

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ing, Tacoma, Washington,

Attorneys for the Defendants in Error.

[1\*]

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*In the District Court of the United States, Western  
District of Washington, Southern Division.*

No. 1590.

WILLIAM COTHARY and MARGARET COTH-  
ARY, Husband and Wife,

Plaintiffs,

vs.

TACOMA RAILWAY AND POWER COMPANY;  
a Corporation,

Defendant.

**Praecipe for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the rec-  
ord in this cause to be filed in the office of the clerk

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\*Page-number appearing at foot of page of original certified Record.

of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error to said Court, including the following pleadings, proceedings and papers, to wit:

Complaint;

Answer to complaint;

Reply to answer;

Verdict;

Judgment;

Petition for new trial;

Order overruling motion for new trial;

Order extending time for filing proposed bill of exceptions;

Bill of exceptions as settled by the Court, with order settling same;

General order continuing court matters over term;

Stipulation to withdraw original bill of exceptions to amend same to conform with amendments proposed by plaintiff; [2]

Order allowing withdrawal and amendments of proposed bill of exceptions;

Assignment of errors;

Petition for writ of error;

Order allowing writ of error;

Bond on writ of error and approval of same.

Omitting all endorsements, verifications, acceptances of services, and file-marks and captions.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Plaintiff in Error.

(Filed Jan. 7, 1915.)

**[Stipulation That Original Exhibits be Sent Up,  
etc.]**

IT IS HEREBY STIPULATED BY AND BETWEEN THE PARTIES HERETO, that the original exhibits may be sent up to the Appellate Court for the inspection of that court, and that said original exhibits are not to be printed or copied into the record.

J. A. SHACKLEFORD and  
F. D. OAKLEY,

Attorneys for Plaintiffs in Error.

TEATS, TEATS & TEATS,  
Attorneys for Defendants in Error. [3]

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**Complaint.**

Plaintiffs complaining of the defendant, say:

I.

That the plaintiffs are at this time and have been at all times herein mentioned, husband and wife, and citizens of the State of Washington, residing at Wilkeson, Pierce County.

That the defendant, Tacoma Railway & Power Company, is a corporation organized and existing under the laws of New Jersey, owning and operating a street railway system in the city of Tacoma.

II.

That the city of Tacoma is a city of the first class with powers to grant by ordinance the right and privilege to the defendant street-car company, to operate its cars to and into the parks of the city of



Tacoma; and also to regulate by ordinance the speed of the cars of the defendant company, while being operated over the streets and in the parks in said city of Tacoma. And that on the 20th day of July, 1913, and for some time prior thereto, the defendant company was operating, among its several lines in the city of Tacoma one known as the Point Defiance Line, which ran from the business center of the city of Tacoma, into Point Defiance Park. That the said company was granted in May, 1905, by Ordinance No. 2389, granting the right and privilege to the defendant company to construct and operate its said street-cars to and into the Point Defiance Park and said ordinance in *in* words and phrases as follows:

“An ordinance granting to the Tacoma Railway & Power Company, its successors and assigns, the right to erect, maintain and operate an electric street railway line within the confines of Point Defiance Park and City of Tacoma, Washington.” [4]

And that by said ordinance the said defendant company was required to maintain fences and gates along said line when necessary; and that the defendant company has maintained said fences and said gates and among the gates maintained by the Tacoma Railway & Power Company along its line in Point Defiance Park, is one at the Nereides Bathhouse and said gate is a revolving gate for use by the public and through which one person at a time can pass.

That on the 20th day of July, 1913, and for some

time prior thereto, the said city of Tacoma had made and provided by Ordinance No. 2252, which is an ordinance regulating the speed of street-cars on the streets and highways and parks of the city of Tacoma, that no street-car running on the streets, highways and parks of the city of Tacoma shall attain a higher rate of speed than twenty miles an hour, where double tracks are used.

### III.

That on the 20th day of July, 1913, and for some time prior thereto, the defendant, Tacoma Railway & Power Company, ran into the said Point Defiance Park, a double track and about one month prior to the 20th day of July, 1913, the said company moved its eastern track or out-bound track, a distance of about four feet closer to the said gate herein mentioned, which left only a clearance, when a car was on said track opposite the gate herein mentioned, of two feet and 5 inches, thereby making it exceedingly dangerous for persons entering said gate when one of the cars of said company was passing by and said dangerous place was known to the defendants, yet carelessly and negligently maintained the same, in that condition, which was unknown to this plaintiff.

### IV. [5]

That on the 20th day of July, 1913, the defendant, Tacoma Railway & Power Company, had in its employ, one Paul Jackson, who, as motorman, was operating one of its cars, the number of which is unknown to this plaintiff, on the Point Defiance Line; and that on the said date, at about the hour of 8 o'clock P. M., the plaintiff, Margaret Cothary,

in company with two other friends, after having looked around the park, went across the tracks at the entrance of the park and walked down the tracks to the gate herein mentioned at the bath-house as is customary for all people who desire to get from the park to the bath-house. That when the said plaintiff, Margret Cothary, was upon the tracks herein mentioned, she noticed a street-car going into the park and she allowed said car to pass before crossing the out-bound track, and when said car had passed, the plaintiff looked to see if said car was followed by another and seeing no car, proceeded to the gate, and finding she could not enter said gate without turning the stile, was in the act of turning the said gate so that she could enter, when suddenly, without warning and not knowing that she was in a place of danger, while on the platform used for the use for persons to alight upon and maintained by said defendant company, the said defendant, through its carelessness and negligence in maintaining its track too close to the said gate, thereby producing a dangerous place in a public park and which was known by defendants, and unknown to this plaintiff; and through the carelessness and negligence of said Paul Jackson, motorman operating said car, in failing to stop said car as made and provided by the rules of said *said* company then in force and in failing to warn said plaintiff, although he knew or should have known, that plaintiff was in a place of danger, and through the carelessness and negligence [6] of said Paul Jackson, in operating his car at too high a rate of speed in a public park, namely, at



about 30 miles per hour which is contrary to the laws and ordinances of the city of Tacoma, namely, Ordinance #2252, as herein mentioned, which regulates the speed of street-cars on the streets and highways and parks where double tracks are used, and which speed is not to exceed 20 miles per hour, struck the plaintiff in the right side and back, thereby throwing her about a distance of 15 feet into a ditch, and thereby producing injuries herein complained of.

V.

That when the plaintiff was struck and thrown by said street-car through the negligence *and of* the defendant, she was rendered unconscious and remained so for some time; and said injuries produced, were a severe strain and tearing of the ligaments and muscles in the pelvic region of her back and hips; and straining and tearing of the muscles and ligaments in the abdominal region; also straining and wrenching of muscles of left leg and spraining the left knee, thereby making her a cripple for life. That the said plaintiff by reason of said injuries so received, has remained in the St. Joseph's Hospital for a period of about seven weeks and during all said time has not been able to get out of bed, only by assistance of nurses; and is at this time only able to walk around the house and then by assistance of crutches. That she has suffered intense pain and mental anguish and will continue to so suffer for a long time to come.

VI.

That at all times prior to the accident herein complained of, the plaintiff, Margaret Cothary, was a



strong, robust woman thirty-eight years of age; always able to perform her duties as a wife and mother and performed other duties as a [7] nurse, earning as such an average of \$30.00 per month; and that by reason of the injuries so received, through the negligence of the defendants, she is unable to perform her duties as a wife and mother and further unable to work at her profession and will not be able to during the balance of her life time. That by reason of the injuries so received, plaintiffs have incurred hospital fees and doctor bills in the sum of One Hundred Eighty-one and 10/100 (\$181.10) Dollars; and are damages in the sum of Fifteen Thousand (\$15,000) Dollars.

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of Fifteen Thousand (\$15,000) Dollars, together with their costs and disbursements herein.

TEATS, TEATS & TEATS,  
Attorneys for Plaintiffs.

(Verification.)

(Filed May 27, 1914.) [8]

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**Answer.**

The defendant for answer to the complaint of the plaintiffs filed herein alleges:

I.

For answer to paragraph one of said complaint, this defendant admits the same and each and every allegation therein contained.

II.

For answer to paragraph two of said complaint,

this defendant admits that it was on the 20th day of July, 1913, operating a street-car line known as the Point Defiance line and that by Ordinance #2389 the defendant company was granted the privilege of running its said car line into said Point Defiance Park, and this defendant further admits that by Ordinance #2252, the speed of its cars was limited to twenty miles per hour where double tracks are used, but this defendant denies each and every other allegation in said paragraph contained.

III.

For answer to paragraph three of said complaint, this defendant admits that on the 20th day of July, 1913, and for some time prior thereto, it operated a double track street-car line into said Point Defiance Park, but this defendant denies each and every other allegation in said paragraph contained.

IV.

For answer to paragraph four of said complaint, this defendant admits that on the 20th day of July, 1913, one of its street-cars operated by Paul Jackson, as motorman collided with the plaintiff, Margaret Cothary, but this defendant denies [9] each and every other allegation in said paragraph contained.

V.

For answer to paragraph five of said complaint, this defendant admits that the plaintiff, Margaret Cothary, received certain slight injuries, but this defendant denies each and every other allegation in said paragraph contained.

VI.

For answer to paragraph six of said complaint,

this defendant denies each and every allegation in said paragraph contained and particularly denies that plaintiffs were damaged in the sum of \$15,000 or in any other sum whatever.

FURTHER ANSWERING AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

I.

That the accident hereinbefore admitted to have occurred, was occasioned by reason of the careless and negligent conduct of the plaintiff, Margaret Cothary, herself, and not otherwise, in that while defendant company's car was being operated in Point Defiance Park near the point known as Nereides Baths at a moderate and lawful rate of speed, plaintiff, Margaret Cothary, heedlessly, recklessly, carelessly, and unnecessarily, placed herself in a position of great danger, to wit, by placing herself and standing in such close proximity to the defendant company's street-car track and so near to the car being operated thereon, at a time when the motorman in charge of said car was unable to stop said car in order to prevent striking said plaintiff; that the said plaintiff, Margaret Cothary, failed to exercise her mental faculties in any way to observe, escape, and avoid the risks and dangers of her position which [10] were open and apparent to her and could have been easily avoided; that she failed to place herself sufficiently far from said car tracks to prevent being struck by the passing car, and failed to take any care or precaution whatever to provide for her personal safety.

WHEREFORE defendant prays that said action be dismissed and that it go hence with its costs and disbursements herein to be taxed.

J. A. SHACKLEFORD,  
F. D. OAKLEY,  
Attorneys for Defendant.

(Verification.)

(Filed June 16, 1914.) [11]

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**Reply.**

Come now the plaintiffs and replying to the affirmative defenses set up in defendant's answer, state:

I.

In reply to paragraph I of the first affirmative defense of the defendant's answer, plaintiff denies each and every part thereof, which is inconsistent with the allegations of the plaintiffs' complaint.

TEATS, TEATS & TEATS,  
Attorneys for Plaintiffs.

(Verification)

(Filed Jul. 2, 1914.) [12]

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**Verdict.**

We, the jury empanelled in the above-entitled cause, find for the plaintiffs William Cothary and Margaret Cothary, husband and wife, and assess their damages at the sum of \$2450—twenty-four hundred and fifty dollars (\$2450).

J. B. SHELTON,  
Foreman.

(Filed June 11, 1915.) [13]



**Judgment.**

This cause coming on regularly for hearing on the 8th day of June, 1915, before the Court and a jury, the plaintiffs appearing in person and by their attorneys, Teats, Teats & Teats, and the defendant appearing by its attorney, Frank Oakley, and the jury being duly impaneled, the cause proceeded with the introduction of testimony from day to day until the close of the 10th day of June, 1915, when the cause was substituted to the jury and the jury retired to consider its verdict; thereafter on the 11th day of June, 1915, the jury returned its verdict into court and found for the plaintiffs and assessed their damages in the sum of \$2,450, and the verdict was thereupon duly filed in said cause, and now on this 12th day of June, 1914, on motion of the plaintiffs for judgment on said verdict.

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the plaintiffs. William Cothary and Margaret Cothary, have and recover, and judgment is hereby entered against the defendant Tacoma Railway & Power Company, a corporation in the sum of \$2,450, together with their costs and disbursements to be taxed according to law.

Dated this 14th day of June, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed June 14, 1915.) [14]

### **Petition for New Trial.**

Comes now the defendant Tacoma Railway & Power Company, defendant in the above-entitled action, and petitions this Honorable Court for an order vacating and setting aside the verdict of the jury and the judgment made and entered in the above-entitled case on the 14th day of June, 1915, and granting a new trial for the following causes, materially affecting the substantial rights of the defendant:

#### **I.**

Excessive damages appearing to have been given under the influence of passion or prejudice.

#### **II.**

Insufficiency of the evidence to justify the verdict in that the evidence failed to show that the defendant's street-car was being operated in violation of any ordinance of the city of Tacoma, or of the laws of the State of Washington, or at a dangerous and excessive rate of speed. The evidence further shows that the plaintiff Margaret Cothary, stepped into a position of danger at a time when the motor-man in charge of [15] defendant's car was unable to stop the car before striking her and that the plaintiff herself was guilty of contributory negligence.

#### **III.**

Error in law occurring at the trial as follows:

a. The Court erred in admitting the testimony of Oscar Helander, over the objection of defendant as follows:

“Q. Did you find out while you were there what was the matter with the turnstile that you could not go?    A. No, sir, not until afterwards.

Q. Well, afterwards, what did you find afterwards?

Mr. OAKLEY.—I object to that question, unless he can tell when he found it, to see how near it is to the time.

Mr. TEATS.—Q. When was it?

A. Well, it was sometime after the accident.

Q. About how long after the accident?

A. I think it was about a week after the accident.

Mr. OAKLEY.—I object to that as being too remote.

The COURT.—Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you.

Mr. TEATS.—Q. What did you find?

A. I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around.” [16]

b. The Court erred in admitting the testimony of Mr. Shoemaker over the objection of defendant, as follows:

“Q. Now, the accident occurs and he places the emergency on at about the time of the accident, then runs 150 feet; what would you say as to the speed then?

A. Well, if he put on the reverse at the time of the accident?

Q. Yes.

Mr. OAKLEY.—Those are not the facts, and I object to that question as not being based upon the testimony.

The COURT.—The objection will be overruled. The jury will be the sole judges of what the evidence was, and if they have no recollection of any evidence to the effect of that embodied in the question, they will disregard the answer.

A. What is the question?

Q. Going down this incline, he strikes a woman, and at about the time of the accident he reverses his car and then runs a distance of 150 feet beyond, what speed would you say that he was going at the time of the accident?

A. Do you mean just pulling the reverse lever, egenerating it?

Q. He-reversed his car—

Mr. OAKLEY.—I object to that question as not based upon the testimony and not the facts.

The COURT.—The objection will be overruled, and the jury given the same instruction. [17]

A. Before I answer I would like to know how he reversed his car. The reason I want to know is because there is two ways of reversing it.

Q. Well, it was first that he goosed the car, is not that what you call it?

A. Now, if he goosed the car he was not going very fast, if he went 150 feet.

Q. If he reversed and gave two or three notches, then what?

A. If he gave two or three notches and went 150



feet, I should judge he was going pretty fast.

Q. Could you judge at what rate?

A. I could not. I worked on that line the day this accident happened, but I do not remember what the facts were."

c. The Court erred in permitting the plaintiff to read the testimony of Paul Jackson, given at the former trial, for purposes of impeachment, without laying proper grounds for impeaching questions.

#### IV.

The Court erred in denying defendant's motion for a directed verdict.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

(Filed Jul. 23, 1915.) [18]

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#### **Order [Denying Petition for New Trial].**

This cause coming on for hearing on the defendant's petition for new trial and the same being submitted, the Court finds the same should be overruled.

IT IS THEREFORE ORDERED that the said petition of defendant be and is hereby denied. Exception allowed defendant.

Dated this 2d day of August, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Aug. 2d, 1915.) [19]

**Order (Extending Time for Filing Proposed Bill of Exceptions).**

Upon motion of defendant for an order granting said defendant a period of sixty days from date hereof in which to serve and file its proposed Bill of Exceptions herein,—

IT IS HEREBY ORDERED that said defendant be and it is hereby granted a period of sixty days from the first day of August, in which to serve and file its proposed Bill of Exceptions.

Done in open court this 2d day of August, 1915.

EDWARD E. CUSHMAN,  
Judge.

(Filed Aug. 2, 1915.) [20]

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**Bill of Exceptions.**

**Transcript of Evidence and Proceedings.**

BE IT REMEMBERED, that heretofore and upon, to wit, the 8th day of June, 1915, the above-entitled case came on regularly for hearing before the Honorable E. E. CUSHMAN, Judge of the above-entitled court, and a jury.

The plaintiffs being represented by their attorneys, and counsel, Teats, Teats & Teats; and,

The defendant herein being represented by its attorneys and counsel, John A. Shackelford and F. D. Oakley; and

Whereupon the following proceedings were had and testimony taken, to wit: [21]

**Testimony of Margaret Cothary, Plaintiff, in Her Own Behalf.**

MARGARET COTHARY, the plaintiff, being called and sworn in her own behalf, testified as follows:

Direct Examination.

(By Mr. TEATS.)

My name is Margaret Cothary. William Cothary is my husband. I live at Wilkeson, and have lived there for the last 35 years. On Sunday, July 20th, 1913, I was visiting my friends Mr. and Mrs. Helander who live on the right-hand side of 54th Street going into the Point Defiance Park which is the entrance of the park in the city of Tacoma. After dinner, about 5 P. M., Mr. and Mrs. Helander and myself walked into the park. We went down the old road that goes down the hill which is out in the center of the park, and after going through a portion of the park we took the boulevard to the rose arbor which is towards the bear pens. We started home, and Mr. Helander asked me if I was ever at the bath-house, and I told him I was not, and he told me it would be a nice time to go down there in the evening if I would care to go, and we went across the green and left that and went along the road along the fence a short distance. We stopped on the edge of the hill before we went down on the tracks. There was a car going into the park and we stopped until it passed, and then went down to the track and walked along the track towards the bath-house.

(Testimony of Margaret Cothary.)

Plaintiff's Exhibits "A," "B," "C," and "E," photographs showing the track and turnstile, were then introduced.

We went there to the gate. Mr. Helander was a little bit ahead of us and he walked in as far as the gate would open and [22] it caught, and he said he would try it the other way, and I thought we could go through either way, and I stepped back a little bit so I could get at it, and I took hold of one of the stiles and Mrs. Helander was next, and he had hold of the other one, and I had hold of one of those when the car hit me.

Exhibit "B" is a photograph of the turnstile showing myself and Mr. and Mrs. Helander at the stile.

Exhibit "C" shows the place where we came down on to the track and the arrow points to the path we came down.

Exhibit "D" is the hospital bill.

We were standing something near that (indicating on exhibit "B"); we were all pushing on those stiles sticking out, and I thought we were going to get around this way (indicating on the exhibit). I didn't notice you could only go one way. I was standing here (indicating on the exhibit) and we were all pushing on those stiles when the car hit me. I didn't know the car was coming at all until just when it hit me. I never heard it at all, but I heard two toots just like two whistles when it hit me. The two whistles were just at the same time. It seemed



(Testimony of Margaret Cothary.)

as though it was just at the same moment. I went into the ditch, I suppose. I don't know exactly what became of me. What I next realized was when Mr. Helander took me up a kind of a bank there and when he went to take me up the bank there, I realized then that he was taking me up the bank. They took me over to my friends, Mr. Helander's, and sent for a doctor. I stayed all night, and the next morning they took me to the hospital. I stayed in the hospital seven weeks. Was in bed all but two days. Dr. Brown attended me there. The car struck me on the right side, the right hip, my right shoulder and elbow, and on the inside of my left knee. I never [23] went to the bath-house. I have never been there yet. We passed some people on the tracks; I cannot say how many, as many as four, possibly six. They were going out of the park as we went in. When leaving the hospital I went home and laid around, part of the time I was up, and part of the time I was down. I walked with crutches. I used first two crutches and then one for a period of sixteen months. I was compelled to use crutches on account of the pain to my limb when I put my weight on my limb. My pain was mostly in the lower part of my back next to the hips. I had trouble in resting in bed, always had a pillow or a rubber ring or something under my back. Didn't rest very good during the first 16 months. Dr. Martin treated me at Wilkeson, Dr. E. M. Brown, in Tacoma. During the last two or three months I am quite a bit better than

(Testimony of Margaret Cothary.)

I was. There are some things I cannot do, and some things I can do all right. I cannot sweep or scrub or anything that is hard or anything that requires much bending. We have to hire that done. Before I was hurt I used to go out nursing whenever I was needed. I was out quite a lot. I worked by the case; I got \$10.00 for each confinement case. I earned, I think, about \$30.00 a month, sometimes I made more, and sometimes less. I cannot nurse now; it is too hard work. I haven't been able to earn anything since I have been hurt. I was never at the turnstile before the time of the accident. At the time of the accident I was there a very short time just as long as it takes to try to go in and then try to go the other way, just that long. We were going to the bath-house. [24]

Cross-examination.

(By Mr. OAKLEY.)

At the time of the accident and the present time I had a little sore on my face which had nothing to do with the accident. The jaw-bone was affected there from a tooth being pulled and broken off and it had been in that condition for five or six years. I was wearing a small plaster over it. The scar on my face is bigger now than it was at that time. The bandage was a little adhesive plaster, about one and a half or two inches in diameter. That was not hurt in this accident. While I was in the hospital Dr. E. M. Brown performed an operation on the 27th of August, just before I went home, and I

(Testimony of Margaret Cothary.)

was injured on July 20th. I don't know, but I suppose the operation was taking a piece of bone out. I went home the 7th of September. Dr. Brown had operated twice before that and he said that he could operate on it before I went home, because I was not doing anything, and he would give it time to get well. The previous operation was in February, I don't know whether it was in the same year or not. It had been in the same condition for five or six years. It would heal up, and at other times it would open.

In crossing the park from the animal pens we followed along that road, right along the fence after we got to it. I could not say whether there was an open road or gravel road running from the gate to that point at that time. We cut across the grass. We went up to the road by the fence, but I did not go any further to see where the road led. It was a sort of a wagon-road. I don't know whether the wagon-road is in the same condition now as then; I didn't see it yesterday. The track or path is overgrown by the brush since that time [25] as I saw it from the track yesterday. I do not know whether the path has been used much, but I suppose the bushes have grown bigger, that is all I can say. I do not know whether the path looks any different now or not. I didn't know as I would ever see the path again; I didn't make an examination of it at that time. The arrow points down to the man standing in the path who is my husband. And when we were going down that path, I saw a car going into the



(Testimony of Margaret Cothary.)

park. No car passed us while we were going down the path. I didn't know that when I stepped off of that path it was a dangerous place to go on to the track. I have been raised on railroad tracks where there are four or five railroad tracks. I certainly have been trained to pay some attention to the approach of trains. I think we walked down on the track nearest to the bath-house, but I couldn't say, on our way to the bath-house. I couldn't say whether the poles were between the tracks at that time. While we walked from the path, I think we all walked along side by side, and when we got to the platform Mr. Helander tried to open the gate, he was ahead. I was right behind him. He went a little further through. That is turning in to about there (indicating), and he went through as far as he could and I was right behind him. Mr. Helander was a little bit further through the turnstile, and I was where Mr. Helander was at one time when we were trying to get in. Mrs. Helander was behind me. I could not tell how close to the track I was, I was trying to get through there and trying to turn that around. I supposed it was a safe place to be and I supposed I could hear a car going, but I didn't. Yes, I was paying attention, I was going to go right through the gate. When we found the gate would not revolve that way we were all [26] trying to work it loose when I got hurt. We were going through first, one back of the other, and in the line we occupied in this position (indicating). We next tried



(Testimony of Margaret Cothary.)

to start to go out and I started to back up to give Mr. Helander room and Mrs. Helander got in there (indicating on exhibit "B"), and I got in this position (indicating on exhibit "B"), something like that. And very soon after I got in that position I was struck, I couldn't say how soon, but we were pushing towards the gate back and forth when it struck me. We were not there very long altogether. We didn't wait at all, we had no conversation over it only he said that he could go through the other way and so I stood back to help push. I was pushing on this (indicating). At the other trial in the state court I stated that I had a foot back a little further than is shown in that photograph. I had my left foot back just pushing, and it was a little further than is shown in the photograph as I could never get my foot so far since the accident and exhibit "B" fails to show my foot back as far as it was, and I couldn't say that when I had hold of the brace of this turnstile that I was standing with my arms back as far from it as shown in the photograph, but I know it was far enough that the car hit me. I was pushing pretty hard, as hard as I could. I don't remember of anything being said by Mrs. Helander at the time we were pushing, or anybody only that he said we would try it the other way. We started to try it the other way. The car struck my right hip, my whole side was all black, my left knee was cut open on the inside of the left knee. I don't know what part of the car hit me. That is me standing

(Testimony of Margaret Cothary.)

there in exhibit "B." I looked back to see whether a street-car was near or not or coming [27] as we stepped on the platform I turned around and looked up the track. I was there for just a short time; I was expecting to go right through the gate and did not look back again. I didn't know I could not get through the gate; I was trying to get through the other way. I did not see the bars sticking out like your fingers; Mrs. Helander was ahead of me and I didn't see the bars. The bars are shown in exhibit "E," but I didn't see them there that night. The turnstile only permitted one to go through on the right-hand side as I understood after the accident. I didn't pay any attention to the distance that my body was from the railroad track as I stood there, because I expected to go through the gate. I was there a very short time. We were not pushing very long when it occurred. The inside of my left knee was certainly struck by the street-car. There were a couple of cuts there. I didn't see the street-car or hear it until it struck me. I heard two toots just as it struck me. There was no car went down as we were going down the railroad track, only one when we were going down the bank. I suppose I could hear that car a long ways off, just a rattling and jolting of the car as it went along there. Sometimes you can hear them a great way off and sometimes you can hear them scarcely at all. It is not a paved track, but sometimes they make a squeaking noise and you can hear them a quarter of a mile away, and I heard

(Testimony of Margaret Cothary.)

nothing. I was expecting to go through the gate and didn't believe the car would strike me. As to the stopping of the car, it is according to how fast it is going. I have seen trains go so fast you could not get out of the road. I didn't attempt to ascertain whether or not a street-car was coming from the time I looked back; I didn't think a street-car could be there. We were just going right through. [28] It was daylight at the time of the accident. My hearing was in perfect condition at the time of this accident and still is. I had perfect eyesight and perfectly well except that sore on my face. I didn't see any signs up there which tell people who wanted to take a street-car at the bath-house to go around the loop. You cannot see that sign unless you are on the inside and we were not inside yet. I was not taking the path or using the turnstile for the purpose of taking a street-car, just going into the bath-house. Mr. and Mrs. Helander were not intending passengers. We were all going through simply to go through to the bath-house.

Redirect Examination.

(By Mr. TEATS.)

The spokes in the turnstile were pointed towards the track. They could be turned while we were there a little ways, just about like that (indicating), just as though the arms would catch or something. I thought they were catching on that bent wire screen about a half circle; I don't know anything about the arms on the other side; I thought it was

(Testimony of Margaret Cothary.)

the screen. The turnstile did not move sufficiently for us to get through. When I said "that far" I mean just simply as it came out to the end of the stile (indicating), and the ends of the stile would not pass by it and of course we could not get past the screen which was on the inside of the turnstile. It seemed to start by this post and just around towards the end of these spokes. I thought it was catching there where we was open there, but I didn't know. Mr. Helander went in a little way and found that he could not go any further, The spokes would turn [29] a couple of feet, I should say, that is the end of the spokes.

Recross-examination.

(By Mr. OAKLEY.)

When I stood there pushing we were pushing towards Mrs. Helander. We pushed it, but it seemed to be stuck again. It would not work that way nor either way, just a little back and forth. When the street-car struck me no part of my body was struck by the turnstile. I was all black on one side.

II.

**[Testimony of Oscar Helander, for Plaintiff.]**

OSCAR HELANDER, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I am a stationary engineer and I live at the corner of 54th and Pearl Streets. Pearl Street is the street in front of my house upon which the street-car runs



(Testimony of Oscar Helander.)

and ends at 54th. That is the entrance of Point Defiance Park. I have lived there 12 years. The people on the south end of the park, wanting to go to the bath-house, generally take the track and follow the track and go through the gate at the bath-house. The track runs north and south. North is towards the park and the bath-house is north from 54th Street, and the main park is to the west of the railroad track and the bath-house. There is a fence part of the ways on either side of the tracks, a little more than halfway up to 54th street on the east side of the track and about 350 feet south of the turnstile on the west side of the track. Everybody, motorcycles, bicycles and even women with baby buggies going to the bath-house, would generally [30] take the track and go through the gate or turnstile. The turnstile had been there a good many years. It is for the purpose of letting the people go through to the bath-house. I suppose at the south of the park is open for a long distance and there is a path or way to reach the track going across there down to the track. It is about the same as it is now, about six feet wide. It runs into the other road and follows a path. It goes up into the park. What I meant was it runs into the other path and then where we went there is about a few feet further back (indicating), that is a few feet north where we went down on the track. The turnstile is about seven feet high with arms on the four sides of it and posts on the north side and the arms join like this (illustrating), and on the south it was open

(Testimony of Oscar Helander.)

for people to go through and there was a latch at the top, but I don't believe that ever worked. That was a sort of a dog. The spindles were four feet from the track, that is from the end of the arm or spindle or spokes. The car extended over the rail towards the turnstile 18 inches. After dinner we decided to go down into the park. It was Sunday, on the 20th day of July, 1913, and we went on what is the best road now, and down to the waterfront, and then followed the waterfront to the rustic bridge; then we went up there again on the main road, and followed that up to the rose arbor, and she looked at some flowers around there, and then we proceeded and passed the greenhouse, and then she decided to go to the bath-house; she had never seen that; so we made up our minds to go. We went as far as the lake, and then we went across there on that path we were talking about down to the track, but while we were up there on that hill, we saw the car going out, or in (indicating), and that is all [31] we seen of the cars, and we went down on to the tracks, the inside track, and followed that to the platform, and as soon as we struck the platform, we went right to the gate. I was leading and when I came to the gate, it stuck. My wife came right behind, and she went on the other side of the gate and said, "Let us try it the other way," and then Mrs. Cothray got between us, in front of the turnstile; so we got it a quarter of the way around, that was all we could do. We could not get it in from there; it was impossible to get it open enough

(Testimony of Oscar Helander.)

to go through, and the moment we got together there the car came. I heard a whistle, and the same moment it struck her, and I should judge it took about a second for the car to pass, and there was a cloud of dust followed the car so I could not see where she landed, but as soon as I could, I went to her assistance, and then when I seen she was alive—she opened her eyes, and I really did not know how to handle her, she was all broke up. I asked her how she was, and she moaned a little. I got her up, and my wife was standing on the platform excited, and I called on her to help me with her up on that bank. We got her up on that bank, and then up on the platform, and set her down on that seat that used to be there, and after we got her up on that seat the car came back there and took her on to the car and around the loop up to my place, and the conductor called for a doctor, so a few minutes after we got her into the house, why the doctor came and attended to her. Mrs. Cothray landed about 16 feet on the lower side close up to the fence.

Here the witness makes a mark on exhibit “E” as about the place where she landed.

After we had reached the platform we didn't look to see [32] whether there was a car coming; we proceeded right ahead; some distance before we struck the platform we looked. I thought it was perfectly safe there, and went the first thing to the gate. We were not expecting to stop on the platform at all.

(Testimony of Oscar Helander.)

Exhibit "B" represents the situation at the time Mrs. Cothray was struck, showing myself with back towards the south.

There was a change in the platform from the time I last was there before the accident to the time Mrs. Cothray was hurt. They had moved the east track towards the platform I suppose 3 or 4 feet; I am not certain of that towards the turnstile. There were people along the track when we were there, they were going south, I don't recollect now, but I think there was six in the bunch. I didn't find out what was the matter with the turnstile when I was there, but afterwards.

Q. Well, afterwards, what did you find afterwards?

Mr. OAKLEY.—I object to that question, unless he can tell when he found it, to see how near it is to the time.

Mr. TEATS.—Q. When was it?

A. Well, it was sometime after the accident.

Q. About how long after the accident?

A. I think it was about a week after the accident.

Mr. OAKLEY.—I object to that as being too remote.

The COURT.—Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you.

Mr. TEATS.—Q. What did you find?

A. I found one spoke of the turnstile was work-



(Testimony of Oscar Helander.)

ing almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around.

[33]

Cross-examination.

(By Mr. OAKLEY.)

Why, I didn't find out the day of the accident was because I never expected the track to be moved over and we had no time to make any investigations. We had pretty nearly got through when she got struck. I was out to see the platform yesterday. I noticed that it had been changed lately. The platform extends ten or 12 feet in fact towards the loop, down towards the main part of the part and towards the bath-house. At the time of the accident the turnstile was almost at the end of the platform, there was a place to stand there. I don't know for how many people, but there was plenty of room for one person. Exhibit "E" shows there is room enough for two persons to stand there, and from exhibit "B" it looks as if my wife had her feet at the very edge of the platform as she pushed there. When we were on the knoll we saw a car going by and when we went down on the path we went down on the track. That path on the track was about 6 feet inside, and the path through the Scotch Broom has room for about two to go abreast. We went one at a time. I didn't know that it is not a public street, that that street-car runs through on that path. I don't know whether it is or not, but it has been used for that

(Testimony of Oscar Helander.)

purpose. Wagons cannot very well go through there; they could, but there is no place to go to there. Motorcycles go down the tracks. People travel it. I call that a highway. Automobiles or wagons could go down it if it was necessary. I don't think it is a public street; it has been used for that purpose, and is to date. I have not seen wagons and automobiles use it. I didn't say that. I mean a public street and highway what people travels. I know it [34] is a private right of way of the street-car company. I didn't know the fence and Scotch Broom is put up there in an attempt to keep the people off. I don't know what they are put up there for. The people generally use that path that I spoke of in going to the bath-house from the park; some people go around the other way at the end of the loop. There is a path leading around the loop where people get on and off the cars. I didn't know at the time of the accident there was a sign telling people going from the bath-house to go this way (indicating) and take a street-car. I didn't know that until I went into court the first time. I heard of it there, and I went and seen it afterwards. The sign shows from the other side of the fence. That is, from the bath-house side of the fence, so that the people going out of the bath-house are told to go back to the loop to get a car. When we looked back before we got to the platform we looked up along the track. We were then about 50 feet away from the platform. From that time on we didn't look again and we went right

(Testimony of Oscar Helander.)

to the platform and when we got on the platform we were certain that were safe. The first thing we did when we got on the platform was to start for the gate to go through the gate. Mrs. Helander and Mrs. Cothary were following me. They were pretty close behind me. My wife went to the other side of turnstile. After my wife got around the turnstile Mrs. Cothary got in front of her. She walked around *that to* the car track and in front of the bars there. She had not been there more than a moment before the car struck her, just about the time she got there, the car struck her. She stood right in front of the turnstile. She didn't walk, she stood and pushed on those bars. She didn't keep that same position any more than a second I suppose, just [35] as she got there. When I first went to push through the turnstile they both stood back of me. I didn't look back to see exactly how they stood but as soon as I found out that we could not get through I told them that the turnstile was stuck and my wife walked to the other side and Mrs. Cothray went in front of the turnstile and just about the time she got there she was struck. Before we got to the turnstile I suppose the car was on the way down grade. I don't know how close Mrs. Cothary stood to the track before she got in front of the turnstile. I heard two toots of the whistle just about the time she was struck and it was just a short time before that she walked to that position. I don't know how far the car was away from us. The two toots seemed to indicate danger, and

(Testimony of Oscar Helander.)

Mrs. Cothary was struck at the same moment, and we never heard the street-car coming.

Redirect Examination.

(By Mr. TEATS.)

There was no other whistle blown except these two that I heard at that accident. I have had experience in railroading. I was fireman for ten years, and I can tell about the rate of speed a car is going when it passes me. That car was going over 30 to 35 miles per hour. I didn't notice where the car stopped after the accident. The sign on the inside of the turnstile was for the purpose of showing to the people to go to the loop to get a car, and the turnstile was there for the purpose of permitting the people to go through into the bath-house. There was no sign outside. I never saw any sign of that kind and the people went there at their will. There is a change there since the accident, the turnstile has been taken out so that the people can go both ways at their will. [36]

Recross-examination.

(By Mr. OAKLEY.)

The way I judged the speed of that car it took about a second for it to pass. I don't know exactly the length of the car but I think the car was about 44 or 46 feet. A car going about 44 feet in a second would be traveling about 30 miles per hour. Now, a street-car 50 feet long going 50 feet in a second is not going faster than I have seen them go. I have been on a locomotive traveling 35 miles per hour. I have



(Testimony of Oscar Helander.)

never figured out how long it would take to travel 50 feet. I figured on this car being 44 feet and I have seen this car since the accident. At the time of the accident I just seen it as it went by the platform. I don't know where it stopped. The car would hold all right going 30 to 35 miles an hour as it went into the curve. I have never tried it on a street-car line. I would know it was going fast if it struck the curve at that rate of speed. The curve like that on a locomotive running 30 to 35 miles per hour is some strain. I would not jump the track.

Redirect Examination.

(By Mr. TEATS.)

I think there is some up-grade after you reach the spur of the track.

## II.

**[Testimony of Anna Helander, for Plaintiff.]**

ANNA HELANDER, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I live on Pearl Street which is right there on the corner on the entrance of the park and have lived there 12 [37] years. I have noticed which way people go while entering the park when they want to go to the bath-house and they all go down the track. They all go down on the track to the bath-house. Everybody goes down to the bath-house, they all walk along the side of the track there, there is no other place to go. I have lived on the corner and I have never seen anybody go any other way. People

(Testimony of Anna Helander.)

going out, go the same way. I have never seen anybody horseback but I have seen motorcycles and baby-buggies go down there.

A. Well, we started from our place on Sunday afternoon, July 20th, and she came over to our place about one o'clock, and we had dinner, and after dinner we went down to the park. We went down the main road until we came down to the picnic ground, and we went from the picnic ground down to the water-front, down to the rustic bridge, and from there to the main road again, and from there to the rose arbor, and then we sat down for awhile there, and then on our way home, we were talking about the bath-house and she said she had never been there, and decided she would like to go to see it, and then we walked until we were up there by the lake, and so we crossed from there down to the—well, there is a little path goes through there and down to the street-car track, and so we went over there and down to the platform and when we came down to the platform, we went over and looked back to see, and I did not see any car in sight, so we crossed over and when we got up on the platform, the first thing we intended to go through, and could not; my husband was ahead and he says: "It is stuck here, we cannot get through," so I went to the other side and tried to jerk it loose. We thought we could jerk it loose, but could not, and so then the car came and struck her. [38] The first I knew the car came was when it struck Mrs. Cothray, I heard the whistle toot just as it struck her. There was no whistle

(Testimony of Anna Helander.)

blown before it struck her. I didn't hear any. I didn't hear any gong rung on the street-car. At the time the car struck Mrs. Cothary I was standing on the left-hand side, exhibit "B" shows me in the picture on the other side with a cap or hood on and when the car struck Mrs. Cothary I stood right in between these cars looking towards the bath-house, trying to get the turnstile loose. I didn't notice Mrs. Cothary at the same minute. We were all three trying to jerk the turnstile loose. We didn't try so very long, I cannot just remember how long it was, but I know that we didn't stay there very long. I noticed where the car stopped because I was wondering if the car was not coming back so I noticed how far the car went. It went to where they try to turn, I noticed it went that far up the curve close to the little cabin. I cannot tell exactly how far. I saw a lot of people that day before we went down on the track and when we went up we met some who were going out of the park from the bath-house.

Cross-examination.

(By Mr. OAKLEY.)

It was daylight when we got to the platform, and we looked for a car before we crossed the track, and I walked on the track so I could meet the car on the out-bound track. The others walked between the tracks, and from our position we could see a car coming towards us, one which might strike us. When we got to the platform my husband was ahead of us and started to push through the turnstile. Mrs.

(Testimony of Anna Helander.)

Cothary came right after him and I came after her. I think she was between us. We were right there together. At the time of [39] the accident we were not on the track, we were all on the platform. The turnstile did not work. He turned and said that we cannot get through, we are stuck. Let us see if we can try to jerk it loose so we did all three of us. I went around to the left-hand side. Mrs. Cothary was right in the middle. I didn't see her going to that position. She didn't need to move to take hold of the arms. Mrs. Cothary had to just step to the side of my husband just a few steps. We were all trying to get it loose. I couldn't tell you the time but we didn't stay there only long enough to try to get it loose. I couldn't see what caused the gate to catch. I didn't see or hear the car at any time until it struck Mrs. Cothary.

**Testimony of William Cothray, One of the Plaintiffs  
[on Behalf of Plaintiff Margaret Cothray].**

WILLIAM COTHARY being called and sworn as a witness on behalf of the plaintiff, Margaret Cothary, testified as follows:

**Direct Examination.**

(By Mr. TEATS.)

The platform was 44 feet long and six feet wide at the turnstile. I measured from the end of the spokes to the street-car and the distance was 2 feet 5 inches up to the car. It is approximately 95 feet to the first curve, [40] and it is 292 feet from the next curve to the turnstile.



**Testimony of Lemuel C. Stine, for Plaintiff.**

LEMUEL C. STINE, being called and sworn as a witness on behalf of plaintiff, testified as follows:

**Direct Examination.**

(By Mr. TEATS.)

I am police officer at Pt. Defiance Park, and have been there for six years, and go to work at 1 P. M. and work until 10:30 P. M. Exhibit "A" represents the railroad track leading down into the park. People going to the bath-house use the railroad track. The turnstile is maintained by the street railway company. There is a path running along the fence and a path running east and west across the railroad leading to the end of the fence where the path goes down to the railroad track. There is no restriction that I know of to the people using the tracks for any purpose. During July and August, more people visit the park than any other day. Four or five hundred during the day and evening visit the bath-house.

**Cross-examination.**

(By Mr. OAKLEY.)

The street-car company regulates the traffic at the turnstile to keep people from getting on the platform. There was a fence all along there, the street-car company repaired it at times, and the street-car company kept a dog on the turnstile to prevent it being used by people going out to the track, but I never saw it when you could not go through it either way. [41]

**Testimony of Otto Ellison, for Plaintiff.**

OTTO ELLISON being called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I live near the park, one block from the end of it, and for six years have noticed people who wanted to go to the bath-house using the track to get there. Quite a few people go up and down the track on Sunday,—they used it the same as a public street.

Cross-examination.

(By Mr. OAKLEY.)

You could not keep them off the track unless you built a fence around it.

**Testimony of Lillian Ellison, for Plaintiff.**

LILLIAN ELLISON, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I live about a block and a half from the entrance of Pt. Defiance Park and have lived there for six years. People going to the bath-house from the south end of the park use the street-car tracks to get there. [42]

**Testimony of Oscar Olson, for Plaintiff.**

OSCAR OLSON, being first called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I have been animal keeper at the park for nine

years, working from 8 A. M. to 5 P. M. From the entrance of the park people walk down the railroad track to go to the bath-house.

**Testimony of J. F. Murdock, for Plaintiff.**

J. F. MURDOCK, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

During the summer of 1913, I lived at the entrance of the park, conducting a store. People wishing to go down to the bath-house invariably went down the railroad track.

**Stipulation [as to City Ordinance No. 2389].**

Mr. TEATS.—It is stipulated, if the Court please, that City Ordinance No. 2389 of the city of Tacoma, an ordinance granting to the Tacoma Railway & Power Company, its successors and assigns, the right to erect, maintain and operate an electric street railway line within the confines of Point Defiance Park in the city of Tacoma, Washington, and repealing Ordinance No. 1004, be introduced, and it is further stipulated that copies of the ordinance can be produced later on.

The COURT.—The jury will so understand.

Mr. TEATS.—The portions which I wish to read are as follows:   |[43]

**[Exhibit—Portions of City Ordinance No. 2389.]**

“Section 1. That there be and is hereby granted to the Tacoma Railway & Power Company, its successors and assigns, the license, right and privilege to construct, operate and maintain a line of double

track electric street railway, together with the necessary poles and wires for electric purposes within Point Defiance Park subject to the rights of the Government of the United States in and to said premises, the rights and privileges herein granted to said Tacoma Railway & Power Company being as hereinafter set forth, and none other.

Section 2. That the said Tacoma Railway & Power Company, its successors and assigns, shall the license, right and privilege, subject to the rights of the United States, to construct, operate and maintain a double track electric street railway within the following boundaries:" Then follows the boundaries which are described here in this exhibit "A." "Provided that the operation of the road within the park shall always be subject to the general rules and regulations adopted by the Park Commissioners for the government of the park.

Section 3. At the terminus or loop of said railway and for a distance along the main line to be agreed upon by said railway company and the Board of Park Commissioners, the said railway company shall construct and maintain a wire fence six feet high with suitable gates and turnstiles for the protection of the public in getting on or off the cars."

[44]

**Testimony of Etta Young, for Defendant.**

ETTA YOUNG, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live in the city of Tacoma. My husband is an



(Testimony of Etta Young.)

inspector employed by the defendant. I was a passenger at the time of the accident, and was taking a ride with the two Misses Liebels. I occupied the right side of the car going out, near the rear, but a little more than half way back. The car stopped at 54th Street and some people got on that I knew. As we were going around the curve I looked out of the open window and saw three persons at the turnstile, and a lady with red on her head was a little distance from the other two, who seemed to be closer together. The lady who was injured had a white bandage on her head. I did not see Mrs. Cothary struck. They were standing at the turnstile. The car whistled when it went into the park, and it whistled afterwards, but I cannot state just when. The car came to a standstill about two lengths from the platform. I did not know whether the car had got to the platform or not, when I felt the brakes applied. The car then backed to the platform and the plaintiff got on. I heard the plaintiff say that she did not hear the car coming, and stepped in front of it.

Cross-examination.

(By Mr. TEATS.)

I do not know how far it was to the platform from the place where I saw the people at the turnstile. It was in the first curve. I was looking out of the right-hand [45] window. The lady with the white bandage was not standing as close to the other track as they were together, but she was closer to the car.

**Testimony of Ellanora Liebel, for Defendant.**

ELLANORA LIEBEL, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was a passenger on the car at the time of the accident, together with my sister and Mrs. Young. I was seated directly back of Mrs. Young. The car stopped at 54th Street and some passengers got on. The car stopped very suddenly about two lengths beyond the turnstile, then backed up. I heard the whistle blow at the entrance of the park. The plaintiff was taken on the car and her head was tied up with something white. I heard her say that she did not see the car coming,—that she must have stepped in front of it.

Cross-examination.

(By Mr. TEATS.)

I first heard the brakes go on and the car stopped with the rear end about two blocks beyond the turnstile. The plaintiff when taken on the car seemed to have a bandage around her head. I heard the plaintiff say that she did not see the car. [46]

**Testimony of Paul Jackson, for Defendant.**

PAUL JACKSON being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was motorman, in charge of the car at the time

(Testimony of Paul Jackson.)

of the accident, and have been a motorman since December, 1912. My regular run was on the Pt. Defiance line. I was operating car No. 143 between 45 and 50 feet long. I stopped at 54th Street for some passengers to get on,—got two bells from the conductor and started into the park about half speed, until I got to the first curve. Then I threw it off. Then as I was going out of the first curve I noticed some people standing on the platform at the bath-house. They did not look to be in any danger from where I was. The car went down with a slight application of air to steady the brakes, but when I got within a car-length or two of the platform I noticed one lady was in danger, but when I saw she was in danger I threw the air over into the emergency and did not have enough air to have much effect on the brakes and when I saw it would not stop it in time I released the air and reversed the car. I blew the whistle two or three times as I was going into the first curve, and blew it again about a car-length from the time I hit plaintiff. The brakes were in good condition and there was no means at my command by which I could have stopped the car sooner than I did. I think the gate struck the woman.

The car went about two lengths beyond the platform and stopped, I then backed the car to the platform. [47]

Cross-examination.

(By Mr. TEATS.)

I had been on this run as a regular run for four or

(Testimony of Paul Jackson.)

five weeks before the accident. During that time the park was visited by large crowds of people. They used the tracks in going from the bath-house out and in whenever the stile is out of order so they can push it either way. There are some people on the track nearly every trip when I go through there but not always on the platform, sometimes people were on the platform. I didn't know the turnstile was out of repair that day. I never knew that the turnstile was out of repair so it could not be worked. When I came down the line and reached 54th street I stopped. It is a regular stop, then got a bell to go on which is necessary in order to go ahead. It is down hill to the platform, but the grade is not quite so steep as when we start at 54th street as it is just before we reach the platform. We start the car with the juice and then when the car gets headway, throw off the juice and let it roll down. It will roll on down clear to the park without any further juice and that is the way I did on this day. I threw off the juice as I was going out of the first curve, that is the curve just inside of the park from 54th street.

Here exhibit "E" is marked with figure 1 in circle. Then the curve goes on down to the point which is marked on the exhibit figure 2 in the circle with red lead pencil. When you get out of the curve that is at figure 2 then strike a tangent, I couldn't say as to the distance between the two, but it is several hundred feet to the point marked figure 3 in the circle, which is another little curve; it is about the same



(Testimony of Paul Jackson.)

as the others was, and as you reach the second curve the [48] grade is a little bit steeper, and then you reach the end of the curve at figure 4 marked in red lead pencil in the circle. Then it is a tangent down to the platform. The grade then commences about a car length or two from the other side of the platform, which would be about the switch. At the point marked with a caret in red lead pencil, then there is an up-grade into the loop. I first saw the people on the platform as I was coming out of the first curve. To the best of my recollection the man and one lady was standing in close to the stile and other lady was standing out closer to the track when I first saw them. It looked like they were standing there in conversation at the stile, right opposite the stile, to the best of my recollection from the time I first seen them until the car struck her. I don't remember that they were standing there as seen in exhibit "B." They may have moved but I never noticed them. It is my duty to look ahead and see where there is any danger on the track or people near the track, that is part of my duty as a motorman, and when I came out of the first curve I looked down to see if my way was clear and I let my car roll on down hill. And then when I came out of the second curve I saw that Mrs. Cothary was in danger. I blew the whistle, I cannot say just what kind of a whistle I gave; I remember blowing it. I then put on the emergency brakes and then ran down

(Testimony of Paul Jackson.)

past the stile, struck her and then ran two cars lengths beyond.

Q. So that when you stopped, you had traveled from the point of collision three car lengths of that car before you stopped?

A. No, sir, I won't say it was that far.

Q. Didn't you say so in your testimony before?

A. I don't remember of it. [49]

Q. The length of that car is about forty-five or fifty feet? A. Yes, sir.

A. And the distance that your car stopped, the rear of your car was then about one hundred feet beyond the point of collision, wasn't that the fact?

A. That would make the rear end two car lengths from the time I hit her.

Q. That would make the rear end two car lengths, or about one hundred feet beyond the point of collision, isn't that a fact?

A. No, sir. I wouldn't say that the car was one hundred feet from the time that I hit her.

Q. And the point of your car was three lengths from the point of collision, isn't that a fact?

A. No, I would not say that either.

Q. Or about one hundred and fifty feet?

A. No, sir.

Q. And didn't you so testify in the trial before?

A. I do not remember saying the rear end of the car was two car lengths from the place where I hit her.

Q. (Reading.) "Q. You were the length of two

(Testimony of Paul Jackson.)

cars past this turnstile before your car stopped?

A. Yes, sir.

Q. That is ,the rear of your car was two car lengths away from the turnstile? A. About that."

Didn't you answer that way?

A. I do not remember of it.

Q. Don't you remember that was your testimony before?

A. That may have been my testimony, but I don't remember all the statements which I made.

Q. Isn't that the testimony that you gave here before on the trial of this case?

A. It may have been; I do not remember. [50]

Q. "Q. That would be three times forty-five or one hundred and thirty-five feet after you passed the turnstile before you stopped your car?

A. From where I was? Q. Yes. A. It would be around that some place." Isn't that what you testified to?

A. I could not say as to that. Of course, if it is down on paper, it may have been.

Q. Don't you remember now that is the way you testified before?

A. I could not say that it is.

Q. Don't you remember now that is about the facts of the case as far as you remember?

A. I remember something about two car lengths, but I don't remember whether it was the rear end or not.

Q. Now, you said that you were about one car

(Testimony of Paul Jackson.)

length, or erty-five or fifty feet away from Mrs. Cothray when you gave the whistle and attempted to stop the car. Is that right?

A. Well, I won't say—well, it was there where I was giving it over into the emergency.

Q. I understand your answer in answer to a question I put to you when you came out of this second curve that you saw Mrs. Cothary was in danger?

A. Just when I got on to the straight track.

Q. And that is about 100 feet from the platform, is it not? A. I could not say as to that.

Q. And about 145 feet from Mrs. Cothary as she stood at the turnstile, is it not?

A. I could not say as to that, either.

Q. Now, at that time, did you apply the brakes?

A. I applied the brakes as soon as I saw she was in danger and would be struck if she did not move.

Q. You saw that she was in this position (illustrating) out [51] towards the platform?

A. She was standing with her back to the tracks, yes, sir.

Q. And Mr. Helander was in front of her to the right? A. Yes, sir.

Q. And Mrs. Helander was in front of her to the left? A. Yes, sir.

Q. And she was in close proximity to the track there?

A. Yes, she was closer to the track than either of the other two.

Q. And so close that you could see that you were



(Testimony of Paul Jackson.)

liable to hit her if she did not get out of the road?

A. Yes, sir.

Q. And you saw that as you came around and out of this second curve?

A. I saw that as I was coming down on that straight track.

Q. About how far away from her were you when you saw her condition?

A. A car length or a car length and a half.

Q. Wasn't it two car lengths?

A. I could not say as to that.

Q. Would you not say now that it might have been two car lengths?

A. No, sir, I would not say that.

Q. You would not say it was less than two car lengths, would you?

A. I would say it might have been a car length or a car length and a half.

Q. You would not say it was about two car lengths?

A. No, sir, I do not know as I would.

Q. Or about 90 feet or 100 feet away?—What is your answer to that?

A. I would not say whether—I do not know about that. [52]

Q. Was it at that moment that you gave the whistle or before that or after that?

A. As soon as I saw she was in danger, that she would be struck by the car if she did not get out of the way.

Q. At that moment you gave her the whistle?

(Testimony of Paul Jackson.)

A. I gave her the warning, yes, sir.

Q. That was at the time that you came out of the second curve on to the straight track?

A. Yes, sir.

Q. That was the time you immediately began to put on the air? You had the air, did you not?

A. I did not have as much as I should have.

Q. That is, you were putting on the air as you came down, as I understand you?

A. Why, I had a slight application on the brakes, that is all.

Q. Now, didn't you testify in answer to questions put to you on cross-examination at the previous trial, that you blew the whistle hard about 100 feet away from Mrs. Cothary?

A. I could not say as to that.

Q. (Reading:) "Q. Then when you got within about 100 feet of them, you gave the air whistle, a shrill whistle? A. Yes, sir." Didn't you testify that way?

A. I gave the whistle when I first seen her there.

Q. What do you mean by giving the whistle when you first seen her there?

A. When I came down that straight track out of the second curve, when I saw she was in danger.

Q. How far away?

A. I could not say as to the distance.

Q. You knew when you were testifying before?

A. Not exactly.

Q. Do you know any more about it now than you did then? [53]

(Testimony of Paul Jackson.)

A. No, sir, I could not say that I do.

Q. When did you give her another whistle?

A. I do not think I gave her another whistle then.

Q. That was the last whistle that you gave?

A. I think so.

Q. Didn't you give two blasts of the whistle just before you struck her?

A. No, sir, I do not remember; it might have been.

Q. Was it a long or short whistle?

A. I could not say as to that, either.

Q. You stated that you were going at the rate of about twelve or fifteen miles per hour. Where were you going about twelve or fifteen miles per hour?

A. That was down about the platform.

Q. Down by the platform?

A. Just about at the platform, yes, sir.

Q. How fast were you going when you were going from the second curve?

A. About the same rate.

Q. How fast were you going when you came out of the second curve?

A. That would be all, about the same rate down through there.

Q. About twelve or fifteen miles per hour when you gave that blast and saw the people in danger? At that time you were going twelve or fifteen miles per hour; is that right? A. Just about that.

Q. Your air was working? A. Yes, sir.

Q. And how fast were you going when you struck Mrs. Cothary?

A. I was probably going a little slower.

(Testimony of Paul Jackson.)

Q. How much slower? [54]

A. I could not say as to that.

Q. About how much was your speed then?

A. I could not say as to that, either.

Q. Could you give us an estimate?

A. No, sir, I could not say that I could.

Q. You knew how fast you were going down hill here (indicating)?

A. Well, it would not have been quite as fast as it would have been there in the curve, any way.

Q. Then with your air on you had slowed up some?

A. That was the cause of slowing up.

Q. Did you slow up? A. A little bit.

Q. How much? A. I could not say how much.

Q. Were the other brake appliances all right?

A. The hand brake?

Q. All the appliances you used to stop a car?

A. Everything was in pretty good order.

Q. As I understand you, you saw the immediate danger, gave the whistle, and then you saw the air was not going to stop the car, and then you reached for your controller and reversed the current, is that true? A. After I released the air.

Q. How did you release the air?

A. Threw it over so as the air will run out of the brakes.

Q. That is done in an instant. You have your hand on your lever going down through there?

A. Generally have.

Q. And you did at that time? A. Yes.



(Testimony of Paul Jackson.)

Q. All you have to do is to shift it over there?

A. Yes, sir.

Q. Then you can reach from your lever and reverse it; all done [55] with a twist of the wrist?

A. Yes, sir, but it is not good to reverse it with the air on.

Q. But you reversed it?      A. Yes, sir.

Q. When you reversed it after putting on the current, isn't there a force that stops the car, too, called goosing it?

A. That is for down grade or something like that.

Q. When you are on a down grade and want to stop it quick, you goose it?

A. Yes, but you would not stop as quick as reversing it.

Q. Did it stop suddenly?      A. Yes, sir.

Q. You can stop a car going twelve or fifteen miles an hour by simply goosing it in a car length?

A. I have never seen it done.

Q. You have tried it?      A. I have.

Q. How long does it take you to stop a car by goosing it?

A. When you goose a car, you reverse it, but you don't give it the juice.

Q. It generates electricity, and that stops the wheels?

A. Stops them for a second, and then it runs on again.

Q. That is why when we are riding on a car it will give a jerk and then run on, and jerk again; that is goosing it?      A. Yes, sir.

(Testimony of Paul Jackson.)

Q. That will stop that car going down a good track in a car length, at the furthest a car length and a half? A. I have never seen it done.

Q. Did you do it in this instance? A. No, sir.

Q. Could you stop it quicker by reversing it?

A. Yes, sir.

Q. Then when you reverse with a reverse lever you throw on [56] the current and that sets the wheels going backwards? A. Yes, sir.

Q. And that is all done with your left hand?

A. Yes, sir.

Q. And it is done in a fraction of a second?

A. I don't say you can do it in that time.

Q. Now, when you are going twelve or fifteen miles per hour, by reversing, you can stop your car in a car length or a car length and a half, when you know you have somebody in front of you whom you are liable to hurt?

A. Sometimes you can and sometimes you cannot.

Q. Why?

A. Some cars it takes longer to generate backwards, and get the wheels in motion.

Q. But it does not take long on those cars, especially 143, to go backwards, making twelve or fifteen miles per hour?

A. That depends on how your air is.

Q. I mean with the air off.

A. I cannot say as to that.

Q. Now, as a matter of fact, Mr. Jackson, what you call an ordinary stop at crossings,—what do you

(Testimony of Paul Jackson.)

call that? A. A passenger stop?

Q. No, sir, a service stop, going twelve or fifteen miles per hour, you can make a service stop with the air within a car length?

A. That is providing you have your air tank full of air to start with.

Q. What do you mean by having your air tank full of air to start with?

A. We have an automatic pump, and that sometimes gets low. [57]

Q. That is pumped up to about 70 pounds per square inch? A. Seventy or eighty pounds.

Q. When it goes down to 55 pounds, the pump starts automatically? A. Yes, sir.

Q. So you can never get below 55 pounds without the pump replacing it?

A. Yes, unless the pump is out of order.

Q. Why didn't you have air enough to stop the car that day?

A. The air was going out through the whistle.

Q. How many times did you blow the whistle?

A. I could not say how many times, but I blowed it so much I didn't have much air.

Q. You didn't blow it between the first and second curve? A. I do not remember.

Q. If it was below 70 pounds, the pump would pump it up? A. I could not say.

Q. So when you struck that curve you must have had fully 70 pounds, excepting one or two short blasts of the whistle?

(Testimony of Paul Jackson.)

A. If I remember, I gave more than one blast of the whistle to start with, the first whistle I gave.

Q. Where was that?

A. If I remember right, about the first curve.

Q. Did you whistle any more until you got into the second curve?

A. I believe I blew three or four times, what we call a "railroad whistle," two long and two short whistles.

Q. When did you arrive at that fact that you blew a railroad whistle?

A. Generally always do blow a railroad whistle going down [58] there.

Q. What was the occasion for that?

A. Well, I do not know; it is my own idea, I guess.

Q. You didn't testify to that before?

A. I do not know how I testified to that before.

Q. You know you did not testify anything about a railroad whistle before?

A. I said I gave a whistle, I do not know as I said what kind I gave.

Q. For the ordinary whistles going down there—then,—even if you gave a railroad whistle, it would not use up the air from 70 to 55 pounds?

A. That depends on how long you blow your whistle.

Q. You blew a whistle all the way down? It would require you to blow your whistle all the way down to release that air?

A. When you are blowing the air out of the whistle,



(Testimony of Paul Jackson.)

it does not take long to reduce the air in the tanks.

Q. So your position is that because you did not have air enough in the tank when you reached the tangent before the platform, your reason is that you wanted to reverse and did not get the air, and could not stop before, by using the air?

A. I could not stop quick enough by the air.

Q. That was because you did not have enough air?

A. Not enough to stop before I struck.

Q. And the reason for that was because you were blowing the whistle all the way down?

A. Not all the way down.

Q. How far down?

A. I blew between the first curve, I do not know whether I blew between the first curve and the second, but I blew it [59] again at the second curve.

Q. When you put the emergency brake on a car, it is felt by the passengers sometimes, is it not?

A. Yes, sir.

Q. Isn't it generally felt when you put on emergency brakes?

A. If you have a good deal of air to start with, to jam the brakes on to lock the wheels.

Q. If you reserve it, that is emergency also?

A. That is another kind of an emergency.

Q. And after you reverse it, it would produce some effect on the passengers in stopping?

A. They can feel it.

Q. It feels as if you hit something?

A. Yes, sir.

(Testimony of Paul Jackson.)

Q. What kind of a track was that that day?

A. A dry track.

Q. So that on a dry track you can stop your car quicker than on a slippery track?

A. Unless it has been raining pretty hard, and then it is about the same as a dry track.

Q. But a dry track is preferred for quick stopping.

A. Yes, sir.

Q. And reversing on a dry track is all right, that will stop a car quickly? A. Yes, sir.

Redirect Examination.

(By Mr. OAKLEY.)

It was against the rules of the company to stop and take on passengers at the platform and turnstile. On Sundays the car stopped when coming out only to let passengers off of the car. I didn't get a signal from the conductor to stop at the platform. [60]

**Testimony of Amelia Liebel, for Defendant.**

AMELIA LIEBEL, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was a passenger on the car at the time of the accident in company with Mrs. Young and my sister. We were seated right back of Mrs. Young and the car stopped at the entrance of the park, several passengers got on, four of whom we were acquainted with. The car came to a standstill and I walked to the back of the car and saw that a lady had been struck. They picked her up and took her to a seat at

(Testimony of Amelia Liebel.)

the turnstile, then when the car backed up they helped her on; at the entrance of the park I heard the whistle. When the brakes were applied the car gave a hard jerk. The plaintiff had a white bandage on her head.

Cross-examination.

(By Mr. TEATS.)

I do not remember hearing any more whistles after the car left the entrance of the park. The first thing I knew was the sudden stopping of the car and the sudden jolt. I did not notice that the car was going fast.

**Testimony of John Blauw, for Defendant.**

JOHN BLAUW, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I was a passenger on the car at the time of the accident, seated in the front of the car. I first heard a kind of a lull, a dull bump, and the next thing some fellow [61] stuck his head out of the window and cried somebody hurt,—the car came to a stop, then a shudder went thru the car, kind of, and then the car came to a stop and I went back to the turnstile. The rear end of the car stopped about 60 feet past the turnstile. Mrs. Cothary was not on the platform yet. The car was traveling at a usual speed down toward the bath-house. Before we could come to the turnstile I noticed a whistle. There was an alarm. It was just about when the lady was hit. I could hear

(Testimon of John Blauw.)

it. I was sitting right in front. I do not remember feeling the brakes applied.

Cross-examination.

(By Mr. Teats.)

The fact of the matter is I don't remember very much about anything up there. Two years ago when you never think of the subject afterwards you don't remember details. I don't remember I didn't hear any statement made by Mrs. Cothary after she was placed on the car. I was sitting close by but I didn't pay any attention to that, I was glad that she was not killed or was not worse. The first I heard of the accident was when I heard a dull bump and wondered what the dull bump was; I heard it plainly and knew that we must have struck something, and then "Oh! Oh!" I didn't feel the shudder of the car like the brakes being put on. The emergency was not put on 50 or 60 feet back. I noticed the bump and that a young fellow with his head through a window said, "Oh! Oh!" Hit her hard enough to make her bump so that you could hear it on the other side of the car. It was a dull bump. I don't think it was the brakes. It was an unusual occurrence. I never experienced a car weighing 57,000 pounds strike a little person [62] like Mrs. Cothary and make a dull bump like that in my life. I was sitting talking with my wife and was not paying much attention to anything; I presume to my wife more than anything else. I don't know when



(Testimon of John Blauw.)

the car passed the turnstile. I don't remember if that bump was when it passed the turnstile or not. I testified in this case before.

Q. You were asked these questions by Mr. Oakley: "Q. Did you get off the car? A. Yes." You testified to that, didn't you? A. Yes, sir.

Q. "Q. How far had the car gone beyond the turnstile?

A. Well, possibly 300 feet." Did you answer that that way. A. No, sir.

Q. "Q. Did you notice that switch there?

A. Yes."

A. Did I answer that I noticed the switch there?

Q. Yes.

A. I forgot all about that.

Q. "Q. Did you notice the switch there?

A. Yes." Did you notice that switch there? Have you ever been out there?

A. I do not remember anything about that now.

Q. Did you ever notice that that switch is upwards of 100 feet away from the turnstile?

A. I don't know. Pardon me, since you have asked me that question, may I ask you a question? You must remember distance is something that I never practice, but after the 60 feet I wrote down, that is why I stick now to the 60 feet.

Q. "Q. How far was it from the cabin? A. Well, quite a distance from the cabin." Did you answer that way? A. Yes, sir.

Q. "Q. From where the car stopped?

(Testimon of John Blauw.)

A. Yes, sir, that is quite a distance." You answered that way.

"Q. Do you know how far it is from the bath-house to the turnstile, how many feet? [63]

A. No, sir. I could not tell you in feet.

Q. Was it half way from the cabin to the turnstile, do you think, where the car stopped.

A. I know the cabin, but just the distance from the cabin I could not say.

Q. Was it closer to the cabin or to the turnstile when you got off?

A. Well, I should say possibly about the middle, possibly so."

Did you answer those questions that way?

A. I think so. That was a year and a half after the accident.

Q. And this is about two years?

A. And still I remember; yes, sir.

Q. Have you got the statement that you made to the company in your pocket?

A. Yes, I got it an hour ago. I wanted to know exactly what I told, because I wanted to tell the truth.

Q. Yes, and you said in this statement, "How far did the car go before it stopped," And you said "Sixty feet."

A. Yes, because I wrote that four days after the accident, because my memory is pretty sure there.

Q. And you say you do not know anything about distance? A. I testified as well as I could.

Q. You are testifying now from a memorandum

(Testimon of John Blauw.)

and not from your recollection. When you testified under oath and said that it was half way between the cabin and the turnstile, what about that?

A. Well, it came to me,—I know exactly what 60 feet is, but when you suddenly asked me a question a year and a half afterwards, a man is likely to make a slip, which I surely did. You kind of caught me napping, without thinking. That is all. [64]

**Testimony of L. E. Albert, for Defendant.**

L. E. ALBERT, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am employed by the defendant as a carpenter and constructed the gates at the bath-house. The gates were first placed at the further end of the loop, at the right is a stationary post with spindles sticking out. One passing between the others to prevent people from coming out and to prevent them from turning it in the opposite direction. There is a ratchet drops into a notch which keeps them from going in thru the gate. Anyone leaving the car can pass thru but they cannot pass out.

On August 1st, 1913, I inspected the gate and found that it was in perfect condition. I found the ratchet raised with a spike driven in it, to hold it up so that the gate could be turned either way. I took the spike out and also put in some new spindles into the gate proper. One of them was broken. On the morning of the second of August from the time I left there the

(Testimony of L. E. Albert.)

evening before that ratchet was put up again with a stick under it. There was a board stuck up down toward the bath-house which said "This way to the park,"—the finger on the board was pointed north, from the platform along a road on the inside [65] of the fence next to the bath-house.

**Testimony of J. C. Alkire, for Defendant.**

J. C. ALKIRE, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I have been employed as a motorman and in the construction department of the defendant company. I have operated car #143 and in my judgment the car would run 15 miles per hour from 54th Street stop to the bath-house. I made the repairs on the platform and removed the turnstile April 14th, 1915. The platform was lengthened about ten or twelve feet, but was not changed in width. The turnstile was at the north end of the platform.

Redirect Examination.

(By Mr. TEATS.)

In my judgment the car #143 could not reach any more than 15 miles per hour down hill after starting on power at 54th Street. Plaintiff's Exhibit "G" is a photograph showing the conditions of the platform.

Redirect examination.

(By Mr. OAKLEY.)

The car could not go down around the curve at 35



or 45 miles per hour; you could not keep the trolley on. [66]

**Testimony of Ben Swanson, for Defendant.**

BEN SWANSON, being called and sworn as a witness on behalf of the defendant, testified as follows:

**Direct Examination.**

(By Mr. OAKLEY.)

I have been a motorman for 28 years, and worked in the city of Tacoma for 24½ years. I have operated car No. 143 on the Pt. Defiance line, and I think the highest speed that car could attain from 54th Street to the bath-house is about 15 miles per hour,—faster speed is prevented by the switches and frogs, the curve and the trolley would not stay on the line. The car coming 15 miles an hour could be stopped not less than 165 or 170 feet. The best way to stop is with the air brake. In making an emergency stop if the wheels begin to slip he would have to release the air and pull the reverse lever and feed up the electricity thru the controller gradually to get the wheels in reverse motion. Going 35 miles per hour the car could be stopped in 350 feet. Going 20 miles per hour, probably in 260 feet.

**Cross-examination.**

(By Mr. TEATS.)

I said at the last trial that the car #143 was geared up to 20 or 25 miles per hour.

**Testimony of James Clark, for Defendant.**

JAMES CLARK, being called and sworn as a witness on behalf of the defendant, testified as follows:

**Direct Examination.**

(By Mr. OAKLEY.)

I have been a motorman nearly 26 years. Have [67] operated on Point Defiance line between 12 and 14 years, and have operated car #143; on the level track the car would make 25 miles per hour with the juice on. Going down to the bath-house with full power on it would go from 25 to 30 miles per hour, but just beyond the bath-house is a switch point and a frog, and it is not safe to run there at a high speed, and as a rule the trolley would be thrown off going around the curve. In running 15 miles per hour the car could probably be stopped in 130 to 150 feet,—it depends altogether upon conditions. You cannot make a surprise stop as easily as a service stop. In going 20 miles per hour the car could be stopped between 230 and 250 feet.

**Cross-examination.**

(By Mr. TEATS.)

In a long distance the car would go down hill faster without current than with current. There is not grade enough going into the park, of course, to increase the speed much, if you threw the power off. The grade is about  $1\frac{1}{2}\%$ . If you started to stop the car going at 15 miles per hour before reaching an object and put on the emergency he would have probably reduced his speed to 7 or 8 miles per hour, and

(Testimony of James Clark.)

could stop the car in possibly 30 or 40 feet.

Redirect Examination.

(By Mr. OAKLEY.)

Car #143 is 50 feet long and weighs 56,900 pounds.

[68]

**Testimony of James N. Young, for Defendant.**

JAMES N. YOUNG, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am employed by the defendant as an instructor for street-car conductors and motormen, and have been motorman for a number of years. Car #143 has two 450 horse-power motors, geared to make between 20 and 25 miles per hour on the level. If car #143 were fed up to the entrance of Pt. Defiance park and let run with a heavy load you could probably make 25 miles per hour.

The car going at the turnstile at the rate of 15 miles per hour, an emergency stop could be made inside of 100 feet to 135 feet. Going 20 miles per hour, it could be stopped in from 150 to 160 feet. The motorman and conductor had orders not to take up passengers at the bath-house on Sundays.

Cross-examination.

(By Mr. TEATS.)

If you have a long down grade and the brakes not set too tight, the car will go as fast as the wheels

will roll. You cannot stop a car under emergency conditions as you can under ordinary conditions. [69]

**Testimony of John A. Jackson, for Defendant.**

JOHN A. JACKSON, being called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am assistant claim agent for the defendant company, and about 1 P. M. the day following the accident, I took the exhibits introduced herein, Plaintiff's Exhibits "G," "F," and Defendant's Exhibit "I." I also took measurements at that time. From the outer edge at the rail of the easterly edge of the platform was 50 inches, and the distance between the outer edge of the rail and the outer edge of the steps of the car #143, was  $29\frac{1}{2}$  inches, right opposite the turnstile, between the step and the end of the arm of the turnstile was 20 inches. The width of the platform was 72 inches,—six 12-inch planks.

**Testimony of Mrs. Helander, for Plaintiff.**

MRS. HELANDER, being called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. TEATS.)

At the time of the accident Mrs. Cothary did not say that she must have stepped in front of the car. She did not have a hat on. She had a little piece of sticking-plaster on her face. Nothing around her head. [70]



**Testimony of Margaret Cothray, the Plaintiff [on Her Own Behalf].**

MARGARET COTHARY, one of the plaintiffs, being called and sworn as a witness on her own behalf, testified as follows:

**Direct Examination.**

(By Mr. TEATS.)

I did not have a bandage on my head, and did not make the statement that I stepped in front of the car.

**Testimony of M. W. Miller, for Plaintiff.**

M. W. MILLER, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

**Direct Examination.**

(By Mr. TEATS.)

I worked seven months as motorman for the defendant. Five months as conductor, and have run car #143 on the Pt. Defiance line. If a car had stopped at 54th Street and the current then put on, when it past thru the first curve the current is turned off and the car coasts down at the turnstile, it would be going 15 miles to 20 miles per hour, and could be stopped at from 75 to 100 feet. Going at the rate of 15 miles per hour with the emergency put on, it could be stopped from 60 to 70 feet. Going at 8 miles an hour, it could be stopped inside of 20 feet. A short whistle at the entrance of the park, then a long whistle, at the first curve, then a railroad whistle, and a couple of blasts 100 feet from the turnstile, would not reduce the air pressure, if the air pump was work-

(Testimony of M. W. Miller.)

ing. With the juice on the car could attain a speed of 25 miles an hour at the platform. [71]

Cross-examination.

(By Mr. OAKLEY.)

I could not run Car #143 faster than 25 miles per hour with all the current on, and this was not on a level track. If the car was going down to the turnstile at 15 miles an hour and a person suddenly appeared in what the motorman discovered to be a dangerous position, and the motorman threw the air on as fast as he could, then threw it off, and threw the current off and reversed the car, it could be stopped in about 125 feet to 150 feet.

Redirect Examination.

(By Mr. TEATS.)

If a motorman was going toward the turnstile on car #143 and when about 100 feet from the platform noticed a person in danger, he applied an emergency, then run a distance of 300 feet beyond the point of collision, I do not see how a car could possibly do it which had been reversed. If he ran 150 feet beyond that point of collision it would either indicate a slick track or else the reverse was not working, and the car was going at least 20 miles per hour.

**Testimony of D. B. Mann, for Plaintiff.**

D. B. MANN, being called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I have worked as a motorman for the defendant

(Testimony of D. B. Mann.)

company for about one year, and have run car #143. The maximum speed down into the park which the car could attain would be 22 miles per hour. [72] With the power off on a grade, it would run faster. If the car was going 15 miles per hour at about 100 feet from the platform and the motorman wanted to make an emergency stop the car could be stopped in a length and a half, if he did not slide. A car will slide easily with the wheels locked. You can stop quicker in a service stop,—say in a car length. If a car with the emergency on went 150 feet past the point of collision, the car would be going 35 miles per hour. The blowing of whistles going into the park would not make much reduction in the air if the pump was working properly.

Cross-examination.

(By Mr. OAKLEY.)

A car can never be stopped twice in the same distance with an emergency stop. It is the hardest stop. A car is more liable to slide. If a woman appeared suddenly in a position of danger on the platform, the distance he stopped the car would be according to how scared he was and how quickly he acted. If he stopped within 150 feet I would say that he hit the party before he applied the brakes. If you stopped a car going 22 miles an hour in its length, it would almost buckle the car into and throw the passengers *threw* the front of the car. I was discharged by the defendant company for reckless driving. Had four accidents in three months. [73]

**Testimony of George S. Shumake, for Plaintiff.**

GEORGE S. SHUMAKE, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

I worked for the defendant company as motorman for about 1½ years, and am familiar with car #143. Car #143 going into Pt. Defiance Park at the first curve with the juice thrown off, brakes adjusted to regulate speed down to 15 miles an hour,—if at that time the motorman about 100 feet from the platform saw a party in imminent danger of being struck by the car, threw the air and reversed his car, I should judge he could stop it in 100 feet. If the car was throwing dust as it past, the turnstile, this might be due to the air he had released. I would consider stopping a car within 100 feet at the bath-house would be a good service stop.

Cross-examination.

(By Mr. OAKLEY.)

An emergency stop is harder to make than a service stop. At the time of the accident if the motorman saw a woman at the turnstile in danger, his car was going 15 miles an hour and he reversed the car, in my judgment it would take at least 150 feet to stop the car. [74]

Redirect Examination.

(By Mr. TEATS.)

If he saw a woman 1000 feet away, she is standing



(Testimony of George S. Shumake.)

there by the arm, he is going down and he is keeping the car under control by the lever and when he gets within 100 feet of her realizes that she does not know he is coming, the car could be stopped within 100 feet. I was discharged by the defendant company.

**[Proceedings had as to Testimony of Witness Jackson.]**

Mr. TEATS.—I would like to have the reporter read some questions and answers in the testimony of the witness Jackson.

Mr. OAKLEY.—I object to any such procedure as that I could call for the reading of the testimony of some of their witnesses.

The COURT.—Is it for your benefit or for the benefit of the jury? [75]

Mr. TEATS.—This is testimony from the former trial, an impeaching question, if the Court please.

The COURT.—You want to have his prior testimony read on some questions asked him in the former trial?

Mr. TEATS.—On those questions, yes, sir.

(Recess to 1:30 P. M.)

Mr. TEATS.—From the evidence of Mr. Jackson at this time, I believe he stated that he did not know what he did testify to on the last trial, that if it was on paper, it was all right. Now, I think we should produce that particular part of the evidence.

The COURT.—I will have to ascertain just what question you asked him and what was in his former

testimony to see whether it was fair to him or not.

Mr. OAKLEY.—As I understand it, the only way you can put on that testimony is where he denied having made it, and there is no denial.

The COURT.—Well, counsel would have the right to make him admit that he did testify formerly so-and-so, if it was at all at variance, or claimed to be at variance with what he testifies now. If he simply says that he did not remember it, it is substantially a denial, and on the other side, does not get the benefit of his admission, if he made an admission.

Mr. OAKLEY.—He was talking about the testimony, and he says if it was on the paper he must have said it.

The COURT.—But that leaves the jury in doubt as to whether he was right or whether the other side was right.

Mr. TEATS.—That puts it up to us to show what was on the paper.

The COURT.—I want to know what the questions were, to see whether the admission that you expect to read is what you gave [76] him a chance to answer about.

Mr. TEATS.—Then we will have the stenographer go on the stand with his notes of the trial of last September as to the witness, Mr. Jackson, upon the points indicated. Mr. Reporter, please turn to that note.

Mr. OAKLEY.—Do you mean the old testimony? I have no objection to the typewritten transcript being used.

Mr. TEATS.—Will you stipulate that these ques-

tions and answers were given in the other trial?

Mr. OAKLEY.—Certainly. I will say that the paper you have is the testimony, but I want to save an exception to Mr. Teats introducing these questions and answers.

The COURT.—Before the questions and answers are read, I want to know the question, what you asked Mr. Jackson yesterday.

Whereupon the reporter read as follows:

“Q. So that when you stopped, you had traveled from the point of collision three car lengths of that car before you stopped?

A. No, sir; I won't say it was that far.

Q. Didn't you say so in your testimony before?

A. I don't remember of it.

Q. The length of that car is about forty-five or fifty feet?      A. Yes, sir.

Q. And the distance that your car stopped, the rear of your car was then about one hundred feet beyond the point of collision, wasn't that the fact?

A. That would make the rear end two car-lengths from the time I hit her.

Q. That would make the rear end two car-lengths, or about one hundred feet beyond the point of collision, isn't that [77] a fact?

A. No, sir, I wouldn't say that the car was one hundred feet from the time that I hit her.

Q. And the point of your car was three car-lengths from the point of collision, isn't that a fact?

A. No, I would not say that either.

Q. Or about one hundred and fifty feet?

A. No, sir.

Q. And didn't you so testify in the trial before?

A. I do not remember saying the rear end of the car was two car-lengths from the place where I hit her.

Q. (Reading:) 'Q. You were the length of two cars past this turnstile before your car stopped?

A. Yes, sir. Q. That is, the rear of your car was two car-lengths away from the turnstile? A. About that.' Didn't you answer that way?

A. I do not remember of it.

Q. Don't you remember that was your testimony before?

A. That may have been my testimony, but I don't remember all the statements which I made.

Q. Isn't that the testimony that you gave here before on the trial of this case?

A. It may have been; I do not remember.

Q. 'Q. That would be three times forty-five or one hundred and thirty-five feet after you passed the turnstile before you stopped your car? A. From where I was? Q. Yes. A. It would be around that some place.' Isn't that what you testified to?

A. I could not say as to that. Of course, if it is down on paper, it may have been." [78]

Mr. OAKLEY.—Upon those questions I am reserving an objection on the ground that there is no ground laid for an impeaching question.

The COURT.—The objection will be overruled. Exception allowed. I rule this way on account of the fact that the witness was not clear, and was will-



ing to admit if it was written out he probably said so, but I believe any impeaching testimony should only go to what you said you read to him. I do not believe if you ask him if he said in substance so-and-so, you can now read what he did say, but where you read his exact words, and then he said he did not remember, I believe you can read from his former testimony what you embodied in your question.

Mr. TEATS.—That is what I am attempting to do at this time, in speaking of the distance that he stopped after passing the turnstile.

WHEREUPON Mr. Teats over the objection of the defendant on the ground that no ground was laid for impeachment questions, Mr. Teats read to the jury the questions and answers read to the Court by the reporter as shown on the three preceding pages.

Thereupon plaintiff rested. [79]

### **Motion for Directed Verdict.**

Whereupon Mr. Oakley on behalf of the defendant, made the following motion:

The defendant at this time moves the court to direct the jury to return a verdict for the defendant for the following reasons:

#### **I.**

That the complaint does not state grounds sufficient to constitute a cause of action.

#### **II.**

That the evidence fails to show that the car was exceeding any speed limit, or operated in a careless or negligent manner, which would afford grounds for recovery on the part of the plaintiff.

III.

That the plaintiff Margaret Cothary herself was guilty of contributory negligence, and that she was a contributing cause to the accident,

Whereupon the Court denied the motion and allowed defendant exceptions.

Whereupon, after argument of the case to the jury by the respective counsel, the Court charged the jury as to the law of the case to which charge no exceptions were taken by either party. [80]

**Instructions.**

The COURT.—Gentlemen of the jury, it is the duty of the Court to advise you concerning the law applicable to the evidence in this case. Counsel in their argument have very fully explained the law of the case to you, and as far as the Court has been able to discern, very fairly so. You will take out with you the pleadings in this case, and they will disclose to you exactly what plaintiffs complain of, and exactly what answer the defendant makes to the allegations of the plaintiffs.

In the course of my instructions I may refer to the plaintiff, and what she did at various times. You will understand that there are two plaintiffs, husband and wife. Under the law where a married woman is injured, it is necessary that her husband join with her in bringing the suit, but the question of what she should have done and what the street-car company should have done, is all treated and disposed of in the case—(interrupted).

Mr. TEATS.—Pardon me, but I filed some re-

quested instructions on the other trial. Are they being considered as filed in this trial?

The COURT.—I had not examined them.

Mr. TEATS.—They were filed before, and I did not know whether,— [81] (interrupted).

The COURT.—I will do the best I can to cover your request. Gentlemen of the jury,—so, the Court, in giving you these instructions may drop into a habit of speaking of the plaintiff, and you will understand at all times that this refers to Mrs. Cothary who was injured, and the Court does not mean to leave the other plaintiff out altogether, but it is only natural that she is the main feature in the issues here, and I may drop into that in giving you these instructions.

The complaint of plaintiff alleges the operation of this street-car in the park, and that on this day in question, July, 1913, that the plaintiff, Mrs. Cothary, while near the street-car track, was struck and injured by one of defendant's street-cars. It alleges that the defendant was negligent in that the street-car was too close to this turnstile, and also that the car was running at too great a rate of speed, and that the motorman did not give any signal or warning to the plaintiff of the approach of the car, and that he was negligent in not stopping the car quickly enough.

Defendant in its answer denies all of this negligence alleged against it by the plaintiff, and alleges that the plaintiff herself was negligent, and that that negligence on her part was the proximate cause of her injury. The plaintiffs deny that the plaintiff,

Mrs. Cothary, was negligent.

These are the issues you are called upon to try.

This is what is called a negligence case. It is [82] the duty of the Court to define to you what negligence is and make it as plain to you as I possibly can. Negligence under the law is what is defined as want of ordinary care, and ordinary care is defined as being the care which an ordinarily careful and prudent person would exercise under like circumstances, and should be proportioned to the peril and danger reasonably to be apprehended from want of proper prudence. It is the rule you should apply in determining whether the defendant was negligent, and it is the rule you should apply in determining whether Mrs. Cothary was negligent, that is, did the motorman exercise ordinary care, or did he exercise less than ordinary care, and you are to determine whether the plaintiff, Mrs. Cothary used ordinary care, or whether she herself exercised less than ordinary care at all times, considering all of the circumstances surrounding the motorman in the one instance and the plaintiff in the other.

The Court instructs you that the question about this turnstile being too close to the track, or its not working, that you will disregard that as an allegation of negligence on the part of the defendant company, but you will not disregard the situation where the turnstile was, and that it refused to work, and the situation in which the plaintiff was placed as being one of the circumstances and a part of the situation as bearing upon whether in view of that situation the motorman in the operation of his car



exercised ordinary care. If this motorman, or any motorman, who, operating a car, knew that ahead of him at such a considerable distance was a grown person, apparently in possession of all of her faculties, who, at the rate of speed the [83] car was being run, had ample opportunity to get out of the way, would have a right to assume that a person would get out of the way, unless there was something in the surroundings and circumstances which would lead an ordinarily careful and prudent person to believe he might be hurt, and it would devolve upon the motorman to take some further precautions to avoid injury.

If a person is negligent, and by their own negligence they are the proximate cause of another's injury then they are responsible and liable for that injury, except as I will otherwise instruct you in this case. Now, to enable a person to recover on account of the negligence of another, that person must not himself have contributed in any way to the happening of the accident by his own negligence or want of ordinary care. The plaintiff in this case, while she was crossing this street-car track, or in close proximity to it, was herself bound to exercise the care that an ordinarily careful and prudent person would exercise in the use of their eyes and ears and faculties, in protecting herself from injury, and if she did not exercise that care, then she cannot recover, even though the defendant was negligent in the operation of its car, as claimed in the complaint. The law does not undertake, if both parties are to blame, in the manner in which it is alleged here, and one is injured,

that is if they are both negligent and one is injured, the law does not undertake to divide the blame. Where both are negligent and one is injured, the injured person has to suffer for the injury, providing [84] the negligence of the injured person was one of the proximate causes of the injury.

As to this expression I have used in these instructions concerning the proximate cause, all I can say to you in defining proximate cause is to say that it is the moving, efficient cause, that cause, which, moving in direct sequence, uninterrupted by any other efficient cause, produces a result. The law says every person is responsible for all the consequences which flow naturally and directly from his voluntary act, but that he is not responsible for consequences which do not flow either naturally or directly from his acts.

I stated what was necessary for plaintiff to prove by a fair preponderance of the evidence. The fair preponderance of the evidence is defined as the greater weight of the evidence; that evidence preponderates which is of such a nature as to create and induce belief in your mind, and where there is a dispute, some of the evidence one way and some of the evidence the other way, that evidence preponderates which is sufficient to overcome the evidence brought against it and still induce and create belief in your minds as to its truth. Now, in this case, as in every other case where a person comes into court, as the plaintiff has done in this case, and alleges negligence on the part of another as a cause of action, before they can recover they must establish by the fair preponderance of the evidence the particular

negligence which they allege, and in this case if you find that the weight of the evidence is with the defendant, [85] either on the ground of negligence, or whether that negligence was the proximate cause of plaintiff's injury, even if you find that the evidence on either of those points is evenly balanced and you are unable to say whether it preponderates in favor of the plaintiff or in favor of the defendant, it would be your duty to find against the plaintiff and for the defendant. That instruction is applicable so far as the allegation of the complaint is concerned that it was the defendant's negligence which caused the injury.

Now, the defendant, having charged that the plaintiff was negligent, the burden of establishing that contributory negligence on her part rests on the defense, unless plaintiff's testimony has shown that she was not.

These questions, that is, whether the defendant was negligent or whether the plaintiff was negligent, are questions of fact that you are to determine in view of all of the circumstances of the situation and surroundings as detailed in the evidence before you, tested by your judgment as practical men.

As I have tried to point out to you the fact that plaintiff cannot recover if she was negligent, although defendant was negligent, I will put it to you in another way; that is, when you go out to your jury room, logically the first thing you will consider is whether the plaintiff had been guilty of contributory negligence. If you find from the preponderance of



the evidence that she was, it would be your duty to stop there and return a verdict for the defendant without going into any other issues of the case. If you find that there was no preponderance of the [86] evidence to show that she had contributed to her own injury by her own negligence, you would then pass on and consider the second question; that is whether the plaintiff by the fair preponderance of the evidence has established that the defendant was negligent in any one of these three particulars which I have submitted to you, that is, the excessive rate of speed of the car, the negligence in not sounding a signal or warning the plaintiff, or negligence in failing to stop the car in time to avoid injury. If you find there was no preponderance of the evidence to show that the defendant was negligent in either of those particulars, then you will stop and return a verdict for the defendant, but if you find that there was a preponderance of the evidence showing that the defendant was negligent in any of these three particulars, then you will go on to the next step and fix the amount which plaintiffs are entitled to recover in this case. If you come to that question in the case, taking into account what the evidence has shown, if anything, regarding the impaired earning capacity of plaintiff, taking into account what the evidence may show regarding her pain and suffering, you will allow plaintiffs such an amount as in the exercise of your best discretion you deem would fairly compensate her for the injuries which she has suffered. I do not mean in giving you this instruc-



tion to omit the amount of bills incurred for doctors and hospital services. You will take that into account also. Do not allow anything for future pain and suffering unless you find from the evidence that [87] it is reasonably certain she is permanently injured or that she will hereafter endure pain or suffering on account of this injury.

There is an allegation in the complaint that there was an ordinance forbidding the running of cars in the park in excess of twenty miles per hour. You will disregard that allegation, as I understand there is no contention now that the mere fact that there would be no right under any circumstances for the street-car company to run its cars in excess of twenty miles per hour in the park.

You will understand I have told you negligence is want of ordinary care, and when you are determining what an ordinarily careful and prudent person would do, you will take into account the circumstances, situation, and surroundings at the time. Now, so far as this allegation of excessive speed is concerned, that rule applies to that as well as the giving of any signal or effort made to stop the car. I told you in a previous instruction that care should be proportioned to the peril and danger reasonably to be apprehended from want of ordinary prudence. You will take into consideration what the evidence may have shown regarding the use that was made by pedestrians of this turnstile or the path along the track. You will take into account ordinary degree of care; by that I do not mean to lead you away from

what I told you about ordinary care. Bear in mind that at all times this motorman was required to exercise ordinary care, and to determine what the exercise of ordinary care would be under the circumstances you will take into account what an [88] ordinary careful and prudent person would have done with that car in view of the extent of use shown by the evidence of the turnstile and platform and the path where this accident happened by the public in the park.

I will read to you certain instructions. They probably will to some extent repeat what I have already told you, but in so far as they do, you will not draw the inference that the Court is trying to unduly impress upon you those particular points of the case to the exclusion of others where I do not repeat the instructions. I am reading these in an attempt to cover the entire case, to leave nothing upon which I have not instructed you.

“I instruct you that the law assumes nothing in favor of the plaintiffs or of their allegations in their complaint, and the burden of proof is upon them at all times to establish affirmatively by the fair preponderance of the evidence their allegations of negligence against the defendant company. The fact that an accident may have occurred, and that the plaintiff, Margaret Cothary may have sustained injury while standing on the platform near the gate in Point Defiance Park, near what is known as the Nereides Baths, raises no presumption of negligence against the defendant company.”

“You are instructed that before the plaintiffs can recover they must show by the fair preponderance of the evidence that the injury which the plaintiff, Margaret Cothary, complains she suffered, was the direct and proximate result of the negligence of the defendant’s employees, [89] as set forth in the complaint, and if the evidence of negligence in this respect is evenly balanced for the plaintiffs and against the plaintiffs, your verdict must be for the defendant, because the plaintiffs have failed in their proof.”

“I instruct you that the defendant charges in its affirmative defense that this accident was the result of the careless, negligent conduct of the plaintiff, Margaret Cothary, herself, in that while defendant’s car was being operated in Point Defiance Park near the point known as the Nereides Baths, at a lawful rate of speed, the plaintiff heedlessly, carelessly, recklessly, and unnecessarily placed herself in a position of great danger by standing in such close proximity to defendant’s street-car track and so near to the car being operated thereon at a time when the motorman in charge of such car was unable to stop said car in order to prevent striking her; that said plaintiff, Margaret Cothary, failed to exercise her mental faculties in any way to observe, escape and avoid the risks and dangers of her position near said tracks, which were open and apparent to her and could have been easily avoided; that she failed to place herself sufficiently far from said track to prevent being struck by a passing car, and failed to take



any care or precaution whatever to provide for her personal safety.”

“I instruct you that if you find from the evidence in this case that the plaintiff, Margaret Cothary, failing to exercise ordinary care, heedlessly and carelessly placed herself in an unsafe and dangerous position on [90] the platform in controversy, in such close proximity to defendant’s railroad track that she was struck by defendant’s car, while said car was being operated in a safe and careful manner, and was injured thereby, this would constitute contributory negligence on her part, and your verdict must be for the defendant.”

“If you find from the evidence that both the plaintiff, Margaret Cothary, and the employees of the defendant company were negligent and that this accident resulted from the joint or concurring negligence of the parties, that is, the negligence of both plaintiff and defendant concurrently contributing to the injury, then your verdict must be for the defendant. The law does not undertake to deal with relative degrees of negligence, and even though defendant’s employees were guilty of negligence, if you also find that the plaintiff, Margaret Cothary’s negligence contributed to the injury, then your verdict must be for the defendant, regardless of the ratio or proportion of negligence of the respective parties.”

“Where the plaintiff so far contributes to the accident by his or her own negligence, or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his or her part the accident would not have occurred, the plain-



tiff cannot recover, and your verdict must be for the defendant.”

“You are instructed that the plaintiff, Margaret Cothary, was not a passenger or an intending passenger of the defendant company, and the company owed her no duty to keep or maintain the platform in question for her use or [91] the use of any other travelers upon said platform, other than passengers or intending passengers of the defendant company. In using said platform, plaintiff could not lawfully complain of the manner in which said platform was built or maintained, or the manner and condition in which the turnstile thereon was built or maintained, but was bound to make use of the platform and turnstile in the manner in which they were constructed, and assumed all risks and dangers incident to the use thereof. But this would not relieve the defendant of the duty to exercise ordinary care in the operation of its cars, and plaintiff would not, by attempting to use the turnstile, assume any risk arising from any negligent operation of its cars by the defendant, if it was so negligent.”

“If you find from the evidence that the plaintiff, Margaret Cothary, was negligent in failing to look and listen or otherwise use her faculties before placing herself in dangerous proximity to defendant’s tracks, and if she had looked or listened or otherwise used her faculties, she could have thereby seen or heard the car in time to avoid the accident, and to have discovered her dangerous position near the defendant’s tracks, then she was guilty of con-

tributory negligence, and your verdict must be for the defendant.”

“The Court instructs the jury that the employees of the defendant company owed to the plaintiff, Margaret Cothary, only that degree of care which an ordinarily careful and prudent person engaged in the same business would have exercised under like and similar circumstances, [92] and if the jury find that the employees of the company exercised such care, then the jury will find their verdict in favor of the defendant.”

“You are instructed that the plaintiff, Margaret Cothary, in this case, was not a passenger of the defendant company, and the defendant company owed her the duty merely of exercising ordinary care to prevent injury to her.”

“You are instructed that a motorman operating a street-car has a right to assume that a person apparently in full possession of his health and faculties, standing near a street-car track, will not carelessly and unnecessarily place himself in a position of danger, unless there is something in the situation to indicate otherwise to a man of ordinary care. In the absence of evidence to the contrary, he has a right to presume that the person is in the exercise of his faculties and that he will stop or turn aside before he steps into a position of danger.”

“I instruct you that the failure of the motorman in charge of a car to blow a whistle or ring a bell, if you find that there was such a failure in this case, or if you find that the car was traveling at an excessive rate of speed, if you find that this was the

case, you would not relieve the plaintiff, Margaret Cothary, from the necessity of taking proper precaution for her own personal safety. Negligence on the part of the company's employees in these particulars is no excuse for negligence on the part of the plaintiff. If you find that she was negligent in failing to look or listen or otherwise exercise her faculties to [93] avoid the accident, and placed herself so near defendant's street-car track as to be struck by a car being operated thereon, then the accident was the result of her own mistake and error in judgment, and the defendant cannot be held liable."

"If you find for the plaintiffs in this case, you will confine your verdict to such an amount as will compensate them for actual loss and damage in the case. You will not allow them anything by way of punishment or exemplary damages. There should be no idea of punishing the defendant in your minds, but simply that of compensating the plaintiffs for their loss, if, as I said before, you should find from the evidence in this case that they are entitled to recover anything."

"The burden is upon the plaintiffs to show by the fair preponderance of the evidence that the injury which the plaintiff, Margaret Cothary, complains of, resulted from the accident. You are not justified in awarding them for purely speculative injuries, that is to say, for the results which may or may not happen, and you will not allow the plaintiffs anything for future pain and suffering unless you are satisfied by the fair preponderance of the evidence that



future pain and suffering are reasonably certain to result from the injuries.”

“You are instructed that the defendant was not required by law, or by ordinance of the city of Tacoma to limit the speed of its street-cars within the boundaries of Point Defiance Park to any particular rate of speed. It was required only to run its cars under the existing circumstances, and if you find from the evidence that [94] defendant’s street-car was operated at a rate of speed equal to twenty miles per hour, or even thirty miles per hour, this in itself would not constitute negligence on the part of the defendant.”

One of your number spoke to me during the day that he thought a number of you would desire to go and take another look at this place where the accident happened. Now, I will ask you if you go out, I do not care to send you out there unless a majority of you, at least seven of you, want to go. After you return to your jury-room, take a ballot on whether a majority want to go and take another view of the premises, and send word to the Court. I will ask counsel to wait until we determine the method of the view to be taken.

The Court submits to you two forms of verdict, one form finding for the plaintiff, which has a blank left in it for you to insert the amount at which you will determine the plaintiff is entitled to recover; the other one simply finds for the defendant. When you have arrived at your verdict, you will cause whichever one of these is to be completed, signed by your foreman and return into Court.



There is one instruction which the Court gives in every case. If you are here very long, you will become used to it, but I have not given it yet in this case. It is that which both counsel have in effect stated to you in their arguments will further instruct you that you are the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the [95] witnesses. In weighing the evidence and passing upon the credibility of the witnesses, the law says you should take into account the appearance of the witnesses as they come before you, not only their appearance, but their manner and demeanor and the way in which they gave their testimony, whether they impressed you as fair-minded, trying to tell you all they knew, not taking from it or adding to it, or whether they impressed you as being reluctant, evasive, trying to keep back something, or whether on the other hand they impressed you as being too willing, and free volunteering information about which nothing had been asked. You will take into account the situation in which each witness was placed as enabling that witness to know exactly what was going on and to be able to detail it to you accurately afterwards, as one witness might be in a much better position to tell you just what took place than another one equally positive. You will take into account the testimony of each witness by itself, whether it appears to be complete, whether it is corroborated where you would expect it to be corroborated if it was true, or whether contradicted by other evidence in the case. You will take into account the interest

which any witness may have in the case, either in their manner of giving their testimony or other relation to the case. Both plaintiffs having taken the stand in their own behalf, you will apply to their testimony the same rule as you do to the testimony of other witnesses, including their natural interest in the result [96] of the case.

THE COURT.—Any exceptions, gentlemen?

(No exceptions.) [97]

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### **Verdict.**

Thereafter the jury returned into open court with a verdict in favor of the plaintiffs for damages against the defendant in the sum of \$2,450.

Now in the furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same may be settled, allowed, signed, and certified by the judge, as provided by law, and filed as a Bill of Exceptions.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

(Filed Sept. 28, 1915.)

(Refiled Dec. 28, 1915, after signing of order settling.) [98]

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### **Order Settling Bill of Exceptions.**

Now, on this 28th day of December, 1915, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said

cause, defendant appearing by F. D. Oakley and John A. Shackelford, its attorneys, and the plaintiffs appearing by Teats, Teats, and Teats, their attorneys, and it appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiffs, within the time provided by law, and that certain amendments have been suggested thereto and that counsel for the plaintiffs and counsel for the defendant have agreed as to the said amendments which should be made, and it appearing to the *clerk* that there has been filed with the clerk of said court a bill of exceptions which contains the amendments agreed upon by the parties, and that the same is in all other respects a duplicate of the proposed Bill of Exceptions filed by the defendant herein in this cause, and it appearing that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that the said Bill of Exceptions as amended by agreement contained all the material facts occurring in the trial of said cause, together with the exceptions thereto and all the material things and matters occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions and the clerk of this court is hereby ordered and instructed to attach the same thereto;

THEREFORE, upon motion of John A. Shackelford and F. D. Oakley, attorneys for the defendant, it is hereby

ORDERED, that said Bill of Exceptions as amended, filed on the 28th day of September, 1915,

be and the same is hereby [99] settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full, and correct Bill of Exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Filed Dec. 28, 1915.

EDWARD CUSHMAN,

Judge. [100]

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**General Order Continuing Court Matters Over Term,  
Made July 6, 1915.**

IT IS NOW ORDERED that court stand adjourned *sine die*, and that all cases, motions, demurrers, and other matters now pending this court at Tacoma, Washington, and not now disposed of are continued until the next regular term hereof. [101]

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**Stipulation (to Withdraw Original Bill of Exceptions  
to Amend Same to Conform With Amendments  
Proposed by Plaintiff).**

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that the original Bill of Exceptions heretofore filed in the office of the clerk of the above-entitled court, in the above-entitled cause may be withdrawn for the purpose of making amendments thereto to conform to the amendments proposed by plaintiff herein. After



amendments made to be submitted to plaintiffs' attys. before submitted to Court for certificate.

TEATS, TEATS & TEATS,

Pltfs. Atty.

J. A. SHACKLEFORD and

F. D. OAKLEY,

Attorneys for Defendant.

(Filed Nov. 29, 1915.)    [102]

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**Order (Allowing Withdrawal and Amendments of  
Proposed Bill of Exceptions.)**

On stipulation of plaintiffs and defendant, by their respective attorneys,

IT IS HEREBY ORDERED that defendant herein be permitted to withdraw the original bill of exceptions heretofore filed in the above-entitled action for the purpose of making amendments thereto.

Done in open court this 29th day of November, 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Nov. 29, 1915.)    [103]

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**Assignment of Errors.**

The defendant Tacoma Railway and Power Company, a corporation, in connection with its Petition for a Writ of Error, files the following Assignment of Errors, upon which it will rely upon its prosecution of its Writ of Error in the above-entitled cause in the United States Circuit Court of Appeals for

*vs. William Cothary and Margaret Cothary.* 101  
the Ninth Circuit for relief from the judgment rendered in said cause :

I.

The Court erred in refusing to grant defendant's motion for a directed verdict upon each and every one of the grounds therein set forth.

II,

The Court erred in admitting the testimony of Oscar Helander over the objection of the defendant, as follows :

“Q. Did you find out while you were there what was the matter with the turnstile that you could not go.

A. No, sir, not until afterwards.

Q. Well afterwards, what did you find afterwards?

Mr. OAKLEY.—I object to that question, unless he can tell when he found it, to see how near it is to the time. [104]

Mr. TEATS.—Q. When was it?

A. Well, it was sometime after the accident.

Q. About how long after the accident?

A. I think it was about a week after the accident.

Mr. OAKLEY.—I object to that as being too remote.

The COURT.—Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you.

Mr. TEATS.—Q. What did you find?

A. I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the

cause of the turnstile not going clear around."

## III.

The Court erred in permitting the plaintiffs to read testimony of Paul Jackson given at a former trial of this cause for the purposes of impeachment, without laying proper grounds for impeaching questions, as follows, to wit:

"Q. You were the length of two cars past the turnstile before your car stopped?      A. Yes, sir.

Q. That is, the rear of your car was two lengths away from the turnstile?      A. About that.

Q. That would be three times 45, or 135 feet after you passed the turnstile before you stopped your car?      A. From where I was?

Q. Yes.

A. It would be around that some place." [105]

WHEREFORE defendant prays that the judgment of the Honorable District Court of the United States for the Western District of Washington, Southern Division, be reversed, and that such direction be given that full force and efficiency may inure to defendant by reason of defendant's defense to said cause.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

(Filed Dec. 13, 1915.) [106]

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**Petition for Writ of Error.**

Comes now the defendant herein, Tacoma Railway and Power Company, and says that on or about the 12th day of June, 1915, this Court entered judgment

herein in favor of the plaintiff and against the defendant in the sum of \$2,450, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

And the defendant further petitions this Honorable Court for an order allowing it to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be [107] made fixing the amount of security which this defendant shall give and furnish upon said Writ of Error, and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.



**Order Allowing Writ of Error.**

On this 13th day of December, 1915, came the defendant herein, Tacoma Railway & Power Company, by its attorneys, and filed herein and present to the court its petition praying for the allowance of a Writ of Error, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises, and said defendant having duly filed an Assignment of Errors intended to be urged by it and the Court being advised in the premises,

IT IS HEREBY ORDERED, that a Writ of Error be and is hereby allowed, to have reviewed, in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the judgment entered herein, and it is further ordered that the amount of the bond on said Writ of Error is hereby fixed at the sum of \$5,000, to be given by the defendant, and upon the giving of said bond, the judgment heretofore rendered will be superseded pending the hearing of said cause, in the Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF, the above order is granted and allowed this 13th day of December, 1915.

EDWARD E. CUSHMAN,

Judge.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Tacoma Railway & Power Company, a corporation, the defendant above named, as principal, and Casualty Company of America, a corporation, organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the plaintiffs in the above-entitled action, William Cothary and Margaret Cothary, husband and wife, in the sum of Five Thousand (\$5,000) Dollars, for which sum, well and truly to be paid to said William Cothary and Margaret Cothary, their executors, administrators, and assigns, we bind ourselves, our and each of our successors, and assigns, jointly and severally, firmly by these presents.

SEALED with our seals this 16th day of December, 1915.

THE CONDITION of this obligation is such that whereas, the above-named defendant, Tacoma Railway and Power Company, a corporation, has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, and whereas, the said TACOMA RAILWAY AND POWER COMPANY, desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said

United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Tacoma Railway and Power Company, a corporation, shall prosecute said Writ of Error to effect, and [110] answer all costs and damages awarded against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise the Court may enter summary judgment against said Tacoma Railway and Power Company and said surety for the amount of such costs and damages awarded against said Tacoma Railway and Power Company and this obligation to remain in full force and effect.

TACOMA RAILWAY AND POWER COMPANY,

By JNO. A. SHACKLEFORD,  
President.

(Seal of Surety Co.)

CASUALTY COMPANY OF AMERICA.

By F. H. SWEETLAND,  
Its Attorney in Fact.

Approved this 22d day of December, 1915.

EDWARD E. CUSHMAN,  
Judge.

(Filed Dec. 22, 1915.) [111]

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[Certificate of Clerk U. S. District Court to  
Transcript of Record.]

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States

District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the above-entitled cause, to wit, William Cothary and Margaret Cothary, husband and wife, vs. Tacoma Railway & Power Company, No. 1590, as the same remains of record and on file in my office, in the city of Tacoma, in said district, the same being made pursuant to praecipe of counsel filed herein, and the same constitutes my return on the annexed Writ of Error.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error and Original Citation, herein, together with the original exhibits herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 267 folios @ 15¢ ea.....	40.05
Certificate of Clerk to transcript of record, 3 folios @ 15¢.....	.45
Seal to said Certificate.....	.20
Certificate and seal to original exhibits.....	.50



ATTEST my hand and the seal of the United States District Court for the Western District of Washington, at Tacoma, in said District, this 12th day of January, A. D. 1916.

[Seal]

FRANK L. CROSBY,  
Clerk.

By E. C. Ellington,  
Deputy Clerk. [112]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 1590.

TACOMA RAILWAY & POWER COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

WILLIAM COTHARY and MARGARET COTH-  
ARY, Husband and Wife,

Defendants in Error.

**Writ of Error (Original).**

United States of America,

The President of the United States of America, to  
the Honorable the Judges of the District Court  
of the United States for the Western District  
of Washington, Southern Division, Greeting:

Because, in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in  
the said District Court before you, or some of you,  
between William Cothary and Margaret Cothary, de-  
fendants in error, and Tacoma Railway & Power  
Company, a corporation, plaintiff in error, a mani-

fest error hath happened, to the great damage of the said Tacoma Railway & Power Company, plaintiff in error, as by its complaint herein appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal distinctly [113] and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, in said circuit, on thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 28th day of December, A. D. 1915.

[Seal]

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington, Southern Division.

By E. C. Ellington,  
Deputy Clerk, U. S. District Court, Western District of Washington. [114]

Due service of the within and foregoing Writ of Error by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as

being attached thereto, hereby is admitted in behalf of all parties entitled to such service by laws or by rules of court, this 28th day of December, 1915.

TEATS, TEATS and TEATS,  
Attorneys for Deft. in Error.

[Endorsed]: No. 1590. In the United States Circuit Court of Appeals for the Ninth Circuit. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. William Cothary and Margaret Cothary, Husband and Wife, Defendants in Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 28, 1915. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 1590.

TACOMA RAILWAY & POWER COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

WILLIAM COTHARY and MARGARET COTH-  
ARY, Husband and Wife,

Defendants in Error.

**Citation (Original).**

The United States of America,—ss.

The President of the United States of America, to  
William Cothary and Margaret Cothary, De-  
fendants in Error, GREETING:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to Writ of Error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Tacoma Railway & Power Company, a corporation, is plaintiff in error, and you, the said William Cothary and Margaret Cothary, are defendants in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and speedy justice done to the parties in that behalf. [115]

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 28th day of Dec. A. D. 1915.

[Seal] EDWARD E. CUSHMAN,  
Judge of the United States District Court for the  
Western District of Washington, Southern Division.

Service of the above and foregoing Citation is hereby acknowledged this 28th day of December, A. D. 1915.

TEATS, TEATS and TEATS,  
Attorneys for Defendant in Error. [116]

[Endorsed]: No. 1590. In the United States Circuit Court of Appeals. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. William Cothary and Margaret Cothary, Husband and Wife, Defendants in Error. Filed in the U. S.



District Court, Western Dist. of Washington, Southern Division. Dec. 28, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

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[Endorsed]: No. 2736. United States Circuit Court of Appeals for the Ninth Circuit. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. William Cothary and Margaret Cothary, Husband and Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed January 15, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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In the United States Circuit Court  
of Appeals for the Ninth Circuit

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TACOMA RAILWAY AND POWER  
COMPANY, a corporation,

*Plaintiff in Error,*

vs.

WILLIAM COTHARY and MAR-  
GARET COTHARY,

*Defendants in Error.*

No. 2736

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BRIEF OF PLAINTIFF IN ERROR.  
UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION.

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F. D. OAKLEY,

*Attorney for Plaintiff in Error.*

408 Perkins Bldg., Tacoma, Washington.

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# In the United States Circuit Court of Appeals for the Ninth Circuit

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TACOMA RAILWAY AND POWER  
COMPANY, a corporation,

*Plaintiff in Error,*

vs.

WILLIAM COTHARY and MAR-  
GARET COTHARY,

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No. 2736

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BRIEF OF PLAINTIFF IN ERROR.  
UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION.

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## STATEMENT OF THE CASE.

This action was brought by the defendants in error to recover damages for injuries sustained by Margaret Cothary by being struck by a street car while attempting to pass through a turnstile on the private right of way of the plaintiff in error at Point Defiance Park, City of Tacoma, Washington, on Sunday, July 20th, 1913.



We call the Court's attention at this time to the photographs introduced in this case as exhibits, and particularly Exhibits A, B, C and E, which show the track and turnstile in the condition they were in at the time of the accident. Exhibit B shows the position occupied by Mrs. Cothary at the time she was injured, standing close to the tracks. Mrs. Cothary and Mr. and Mrs. Helander, the other two persons shown in Exhibit B, were visiting Point Defiance Park, and, desiring to visit the bathhouse, a portion of which is shown in Exhibit B, they walked across the park to a little path through some scotch broom, which is shown as Exhibit C, and which path was at the end of the wire fence enclosing the right of way of the tracks. Under the ordinance permitting the construction of the street car tracks it was provided that:

“At the terminus or loop of said railway and for a distance along the main line to be agreed upon by said railway company and the Board of Park Commissioners, the said railway company shall construct and maintain a wire fence six feet high with suitable gates and turnstiles for the protection of the public in getting on or off the cars.” (R., p. 43.)

After going down this path, they walked on the track towards the bathhouse, and attempted to pass through the turnstile. Mr. Helander was then ahead, and Mrs. Cothary next to him. When the

turnstile failed to permit them to pass through to the bathhouse they stepped back, intending to try to push the turnstile in the opposite direction, and Mrs. Helander got to the position shown in Exhibit B, she being the woman with the white scarf around her head, and Mrs. Cothary stepped back towards the track and took hold of the bar, all of this occupying but a moment, and just as she got ready to push she was struck by a street car coming into the park.

Mrs. Cothary and Mr. and Mrs. Helander all testified that they had been at the turnstile but a few moments, and that Mrs. Cothary had no sooner stepped from the place of safety she had first occupied to take a hold of the end of the bars of the turnstile, as shown in Exhibit B, than she was struck by the car. Her own testimony is as follows:

“\* \* \* The arrow points down to the man standing in the path, who is my husband. And when we were going down that path, I saw a car going into the park \* \* \* I think we walked down on the track nearest to the bathhouse, but I couldn't say, on our way to the bathhouse. \* \* \* While we walked from the path, I think we all walked along side by side, and when we got to the platform Mr. Helander tried to open the gate, he was ahead. I was right behind him. He went a little further through. That is turning in to about there (indicating), and he went through as far as he could and I was right behind him. Mr. Helander was a little bit further through the turnstile, and

I was where Mr. Helander was at one time when we were trying to get in. Mrs. Helander was behind me. I could not tell how close to the track I was, I was trying to get through there and trying to turn that around. I supposed it was a safe place to be and I supposed I could hear a car going, but I didn't. Yes, I was paying attention, I was going to go right through the gate. When we found the gate would not revolve that way we were all trying to work it loose when I got hurt. We were going through first, one back of the other, and in the line we occupied in this position (indicating). We next tried to start to go out and I started to back up to give Mr. Helander room and Mrs. Helander got in there (indicating on Exhibit B), and I got in this position (indicating on Exhibit B), something like that. *And very soon after I got in that position I was struck*; I couldn't say how soon, but we were pushing towards the gate back and forth when it struck me. *We were not there very long altogether. We didn't wait at all*, we had no conversation over it only he said that he could go through the other way, and so I stood back to help push. I was pushing on this (indicating). \* \* \* I had my left foot back just pushing, and it was a little further than is shown in the photograph, as I could never get my foot so far since the accident and Exhibit B fails to show my foot back as far as it was, and I couldn't say that when I had hold of the brace of this turnstile that I was standing with my arms back as far from it as shown in the photograph, but I know it was far enough that the car hit me. \* \* \* *I was there for just*



*a short time; I was expecting to go right through the gate and did not look back again. I didn't know I could not get through the gate; I was trying to get through the other way. I did not see the bars sticking out like your fingers; Mrs. Helander was ahead of me and I didn't see the bars. The bars are shown in Exhibit E, but I didn't see them there that night. The turnstile only permitted one to go through on the right-hand side, as I understood after the accident. I didn't pay any attention to the distance that my body was from the railroad track as I stood there, because I expected to go through the gate. I was there a very short time. We were not pushing very long when it occurred. The inside of my left knee was certainly struck by the street car. \* \* \* When the street car struck me no part of my body was struck by the turnstile."* (R., pp. 22-26.)

Oscar Helander testified to practically the same facts as did Mrs. Cothary, to-wit:

*"\* \* \* We went down on to the tracks, the inside track, and followed that to the platform, and as soon as we struck the platform, we went right to the gate. I was leading and when I came to the gate, it stuck. My wife came right behind, and she went on the other side of the gate and said, 'Let us try it the other way,' and then Mrs. Cothary got between us, in front of the turnstile; so we got it a quarter of the way around, that was all we could do. We could not get it in from there; it was impossible to get it open enough to go through, and the moment we got together there the car came. I heard a whistle, and the same moment it struck*



*her. \* \* \* After we had reached the platform we didn't look to see whether there was a car coming; we proceeded right ahead; some distance before we struck the platform we looked. I thought it was perfectly safe there, and went the first thing to the gate. We were not expecting to stop on the platform at all.*

*“\* \* \* The platform extends ten or twelve feet in fact towards the loop, down towards the main part of the park and towards the bathhouse. At the time of the accident the turnstile was almost at the end of the platform, there was a place to stand there. I don't know for how many people, but there was plenty of room for one person. Exhibit E shows there is room enough for two persons to stand there, and from Exhibit B it looks as if my wife had her feet at the very edge of the platform as she pushed there. When we were on the knoll we saw a car going by and when we went down on the path we went down on the track. \* \* \* When we looked back before we got to the platform we looked up along the track. We were then about fifty feet away from the platform. From that time on we didn't look again and we went right to the platform and when we got on the platform we were certain that we were safe. The first thing we did when we got on the platform was to start for the gate to go through the gate. Mrs. Helander and Mrs. Cothary were following me. They were pretty close behind me. My wife went to the other side of the turnstile. After my wife got around the turnstile Mrs. Cothary got in front of her. She walked around that to the car track and in front of the bars there. She had not been*

*there more than a moment before the car struck her, just about the time she got there, the car struck her. She stood right in front of the turnstile. She didn't walk, she stood and pushed on those bars. She didn't keep that same position any more than a second, I suppose, just as she got there. When I first went to push through the turnstile they both stood back of me. I didn't look back to see exactly how they stood, but as soon as I found out that we could not get through I told them that the turnstile was stuck and my wife walked to the other side and Mrs. Cothary went in front of the turnstile and just about the time she got there she was struck. Before we got to the turnstile, I suppose the car was on the way down grade. I don't know how close Mrs. Cothary stood to the track before she got in front of the turnstile. I heard two toots of the whistle just about the time she was struck and it was just a short time before that she walked to that position. I don't know how far the car was away from us. The two toots seemed to indicate danger, and Mrs. Cothary was struck at the same moment, and we never heard the street car coming."* (R., pp. 29, 30, 32, 33, 34, 35.)

Anna Helander testified as follows:

"\* \* \* I did not see any car in sight, so we crossed over and when we got up on the platform, the first thing we intended to go through, and could not; my husband was ahead and he says: 'It is stuck here, we cannot get through,' so I went to the other side and tried to jerk it loose. We thought we could jerk it loose, but could not, and so then the car came and struck her. The first I knew the car came was when it struck Mrs.

Cothary. I heard the whistle toot just as it struck her. There was no whistle blown before it struck her. I didn't hear any. I didn't hear any gong rung on the street car. At the time the car struck Mrs. Cothary I was standing on the left hand side, Exhibit B shows me in the picture on the other side with a cap or hood on and when the car struck Mrs. Cothary I stood right in between these cars looking towards the bathhouse, trying to get the turnstile loose. I didn't notice Mrs. Cothary at the same minute. *We were all three trying to jerk the turnstile loose. We didn't try so very long, I cannot just remember how long it was, but I know that we didn't stay there very long.* \* \* \* It was daylight when we got to the platform, and we looked for a car before we crossed the track, and I walked on the track so I could meet the car on the outbound track. The others walked between the tracks, and from our position we could see a car coming towards us, one which might strike us. When we got to the platform my husband was ahead of us and started to push through the turnstile. Mrs. Cothary came right after him and I came after her. I think she was between us. We were right there together. At the time of the accident we were not on the track, we were all on the platform. The turnstile did not work. He turned and said that we cannot get through, we are stuck. Let us see if we can try to jerk it loose, so we did, all three of us. I went around to the left hand side. Mrs. Cothary was right in the middle. I didn't see her going to that position. She didn't need to move to take hold of the arms. Mrs. Cothary had to just step to the side of my husband, just a few



steps. We were all trying to get it loose. *I couldn't tell you the time, but we didn't stay there only long enough to try to get it loose.*" (R., pp.. 37, 38, 39.)

The complaint alleges that the car was exceeding an ordinance of the City of Tacoma which limited the speed of cars to twenty miles per hour, but during the trial it appeared that there was no ordinance limiting the speed of cars within the park limits, and the Court so instructed the jury, as shown in the Transcript of Record, page 95.

It will also be remembered that the provision of the ordinance hereinabove quoted provides for the maintenance of gates and turnstiles, as follows:

"The said railway company shall construct and maintain a wire fence six feet high, with *suitable gates and turnstiles for the protection of the public in getting on or off the cars.*"

The Court instructed the jury in reference to the turnstile, as follows:

"The Court instructs you that the question about this turnstile being too close to the track or its not working that you will disregard that as an allegation of negligence on the part of the defendant company."

This instruction was not excepted to by the defendants in error. There was no testimony introduced to show that the gate refused to work at any other time during the day on which the accident occurred. The motorman, Jackson, testified that the gate was in order during the day, and



the facts would indicate that undoubtedly the gate was being used by a large number of people in getting off of the street car, and going into the bathhouse.

Paul Jackson, the motorman in charge of the car, testified as follows:

“\* \* \* As I was going out of the first curve I noticed some people standing on the platform at the bathhouse. They did not look to be in any danger from where I was. The car went down with a slight application of air to steady the brakes, but *when I got within a car-length or two of the platform I noticed one lady was in danger, but when I saw she was in danger I threw the air over into the emergency* and did not have enough air to have much effect on the brakes, and when I saw it would not stop it in time I released the air and reversed the car. I blew the whistle two or three times as I was going into the first curve, and blew it again about a car-length from the time I hit the plaintiff. The brakes were in good condition and there was no means at my command by which I could have stopped the car sooner than I did. I think the gate struck the woman.”

On cross examination he testified as follows:

“Q. I understand your answer in answer to a question I put to you when you came out of this second curve that you saw Mrs. Cothary was in danger?”

“A. Just when I got on to the straight track.”

“Q. And that is about 100 feet from the platform, is it not?”

"A. I could not say as to that."

"A. I applied the brakes as soon as I saw she was in danger and would be struck if she did not move."

"Q. You saw that she was in this position (illustrating) out towards the platform?"

"A. She was standing with her back to the tracks, yes, sir."

"Q. And Mr. Helander was in front of her to the right?"

"A. Yes, sir."

"Q. And Mrs. Helander was in front of her to the left?"

"A. Yes, sir."

"Q. And she was in close proximity to the track there?"

"A. Yes, she was closer to the track than either of the other two."

"Q. And so close that you could see that you were liable to hit her if she did not get out of the road?"

"A. Yes, sir."

"Q. And you saw that as you came around and out of this second curve?"

"A. I saw that as I was coming down on that straight track."

"Q. About how far away from her were you when you saw her condition?"

"A. A car length or a car length and a half."

"Q. Was it at that moment that you gave the whistle or before that or after that?"

"A. As soon as I saw she was in danger, that she would be struck by the car if she did not get out of the way."

"Q. At that moment you gave her the whistle?"

"A. I gave her the warning, yes, sir."

The uncontradicted testimony was that this platform was constructed and maintained only for persons getting off from the street car, going to the bathhouse, and on the inside of the fence next to the bathhouse was a sign telling intending passengers to take a pathway up to the loop to get on board the street cars. On Sundays the cars never stopped at the platform, except to let off passengers.

It will be remembered that the plaintiff in this instance was not a passenger, or even an intending passenger. The private right of way was enclosed by a wire fence, according to the provisions of the ordinance, and was so enclosed in an attempt to keep people off of the right of way, but in spite of this the evidence shows that it was frequently used by pedestrians going down to the bathhouse from the entrance of the park.

At the close of all the testimony plaintiff in error made a motion for a directed verdict, which was denied, and which is assigned as error.

The Court also permitted Mr. Helander to testify as to the condition he found the turnstile in one week after the accident without showing that the condition was the same then as at the time of the accident. The Court also permitted the defendants in error to attempt to impeach the testimony of Mr. Jackson without laying any grounds for introducing impeaching questions.

## ASSIGNMENTS OF ERROR

## I.

The Court erred in refusing to grant defendant's motion for a directed verdict upon each and every one of the grounds therein set forth. (R., pp. 80-1.)

## II.

The Court erred in admitting the testimony of Oscar Helander over the objection of the defendant, as follows:

"Q. Did you find out while you were there what was the matter with the turnstile that you could not go?"

"A. No, sir, not until afterwards."

"Q. Well, afterwards; what did you find afterwards?"

Mr. OAKLEY: "I object to that question, unless he can tell when he found it, to see how near it is to the time."

Mr. TEATS: "Q. When was it?"

A. "Well, it was some time after the accident."

"Q. About how long after the accident?"

"A. I think it was about a week after the accident."

Mr. OAKLEY: "I object to that as being too remote."

The COURT: "Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you."

Mr. TEATS: "Q. What did you find?"

"A. I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around."



## III.

The Court erred in permitting the plaintiffs to read testimony of Paul Jackson given at a former trial of this cause for the purpose of impeachment, without laying proper grounds for impeaching questions, as follows, to-wit:

“Q. You were the length of two cars past the turnstile before your car stopped?”

“A. Yes, sir.”

“Q. That is, the rear of your car was two lengths away from the turnstile?”

“A. About that.”

“Q. That would be three times 45, or 135 feet after you passed the turnstile before you stopped your car?”

“A. From where I was?”

“Q. Yes.”

“A. It would be around that some place.”

## ARGUMENT

PLAINTIFF IN ERROR CONTENDS THAT THE DEFENDANT IN ERROR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN SUCH A MANNER AS TO PRECLUDE A RECOVERY IN LAW, IN WALKING IN FRONT OF THE TURNSTILE AND PLACING HERSELF TOO NEAR TO THE TRACK, DIRECTLY IN FRONT OF AN APPROACHING STREET CAR.

This case was tried in the Superior Court of the State of Washington, for Pierce County, and after trial thereof a judgment of non-suit was entered, whereupon this case was started in the

United States District Court, from which this Writ of Error is prosecuted.

In the statement of the case hereinabove set forth, testimony material to the determination of the questions involved has been called to the Court's attention, and we will not repeat the same to any great extent. The facts involved are not complicated nor disputed. If we accept defendant in error's version of how the accident happened we find that upon arriving at the platform she immediately went to the turnstile and attempted to pass through to the bath house; at this time they were all in a place of safety, none of them being near the tracks. When the turnstile failed to work, they stepped back. Mrs. Helander had to pass around the arm of the turnstile to the left, and Mrs. Cothary had to take just a few steps to get to the position where she was struck, as shown in Exhibit B. She testified:

"And very soon after I got in that position I was struck \* \* \* We didn't wait at all. I was there for just a short time. I was expecting to go right through the gate, and did not look back again. \* \* \* I didn't pay any attention to the distance that my body was from the railroad track, as I stood there, because I expected to go through the gate; I was there a very short time. We were not pushing very long when it occurred."  
(R., pp. 23-26.)

Oscar Helander, who has been a fireman on a locomotive for ten years, testified that Mrs. Cothary

got in front of the turnstile, and his wife went over to the left of her, and

“The moment we got together there the car came. I heard a whistle, and the same moment it struck her. After we got to the platform we didn’t look to see whether there was a car coming.” (R., pp. 29-30.)

Also:

“She had not been there more than a moment before the car struck her. She didn’t keep that same position any more than a second, I suppose; just as she got there.” (R., p. 34.)

Also:

“I heard two toots of the whistle just about the time she was struck, and it was just a short time before that she walked to that position.” (R., p. 34.)

It was proven by several witnesses that the car whistled at different times going into and down through the park. (R., pp. 44, 45, 62.) The motorman also testified that he blew the whistle two or three times on his way down from the entrance to the park to the place of the accident, which was only a short distance.

We submit to the Court that these facts show conclusively that she stepped from a place of safety on the platform to a point too near the tracks and directly in front of the street car, without regard to her own safety, or as she testified:

*“I didn’t pay any attention to the distance that my body was from the railroad track as I stood there, because I expected to go through the gate.”*

We can scarcely conceive of facts which could more clearly constitute contributory negligence.

We will concede that defendant in error was a licensee, and the rule of law as laid down by this Court in *Northern Pacific Ry. Co. v. Jones*, 144 Fed. 47 fixes the degree of care of plaintiff in error to be that of exercising reasonable precautions to avoid injuring her.

This Court in the above case held that the District Court was in error in refusing to grant a directed verdict in the case where a man in the full possession of his faculties was injured while walking along a railroad track as a licensee, by being struck by a locomotive negligently operated, without exercising his faculties of sight or hearing to protect himself. This Court therein said:

“Assuming that the evidence which went to the jury proves that the railroad company was negligent in not discovering the presence of the defendant in error on its track, what shall be said of the evidence of the contributory negligence of the defendant in error? A general license to the public to walk upon a railroad track does not mean that the railroad company is to be the insurer of the safety of all persons who avail themselves of that permission. While the license adds to the responsibilities of the railroad company, and imposes upon it a greater burden of care, it does not affect the duty that rests upon the licensee to take all due precautions to avoid injury to himself. If the negligence of the defendant in error was one of the proximate causes of the injury which he sus-



tained, if it directly contributed to the unfortunate result, he cannot recover, even though the negligence of the plaintiff in error contributed to it; and the rule is the same whether the injured person be a trespasser on the railroad track or a licensee. *Kansas City, Ft. S. & M. R. Co. v. Cook*, 66 Fed. 115, 13 C. C. A. 364, 371, 28 L. R. A. 181; *Felton v. Aubrey*, 74 Fed. 350, 360, 20 C. C. A. 436; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; *Louisville & N. Ry. Co. v. McClish*, 115 Fed. 268, 273, 53 C. C. A. 60; *King v. Illinois Central R. R. Co.*, 114 Fed. 855, 862, 52 C. C. A. 489; *Missouri Pacific Railroad Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, 645.

In *Morgan v. N. P. Ry. Co.*, 196 Fed. 449, this Court held that a pedestrian, who as a licensee was walking on a railroad track on a dark and windy night, in stepping from a place of safety on a beaten path between the tracks to a position between the rails, where he was killed by a train approaching from the rear, was guilty of contributory negligence.

In *Kaiser v. N. P. Ry. Co.*, 203 Fed. 933, the Court held a pedestrian guilty of contributory negligence in walking through a railroad yard, along a path, and then leaving the path, and walking along close to another track, where he was struck by an overhanging cross-beam of an engine. In the above case the Court said:

“That he was a prospective passenger, and therefore rightfully upon the company’s property, can make no difference. The rule

applies to trespasser and licensee alike. Neither is absolved from the exercise of care to avoid known impending danger commensurate with the imminence of that danger. Here the plaintiff, although aware of the approach of an engine in a yard used for switching in the breaking and making of trains, deliberately turned his back upon it, and invited the injury which he speedily suffered. He was not between the rails of the track, but upon a path beside the track, which afforded ample space within which to walk without injury from passing engines and cars. His companion and others were passed by this same engine without injury. The plaintiff heedlessly walked so close to the rails that he came within reach of the usual overhang or crossbeam. Here, again, his negligence is apparent, and was the primary and efficient cause of the injury.

"The failure to ring the bell or blow the whistle of the engine was, at most, concurring or succeeding negligence, which failed to prevent the natural consequences of plaintiff's carelessness, but was not of itself such negligence as would render defendant liable. Ordinary care required that he be alert in the use of his senses of sight and hearing to guard himself from harm, and no reliance on the exercise of care by persons in control of engines or trains can excuse his failure to exercise such care. The plaintiff had been long and constantly familiar with the conditions there existing. There is no claim that defendant's servants saw him and ran him down wantonly and recklessly. He was walking, not upon, but beside the track, and presumed to be conscious of his situation and mindful of his safety. This, and other

Courts, have dealt so fully and conclusively with every principle of law here presented for consideration, that further elaboration is felt to be unnecessary. *Missouri Pacific Ry. Co. v. Mosely*, 6 C. C. A. 641, 57 Fed. 921; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115, 28 L. R. A. 181; *Garlich v. Northern Pac. Ry. Co.*, 67 C. C. A. 237, 131 Fed. 837; *St. Louis & S. F. R. Co. v. Summers*, 97 C. C. A. 328, 173 Fed. 358; *Hart v. Northern Pac. Ry. Co.*, 116 C. C. A. 12, 196 Fed. 180."

In this case defendant in error suddenly left a place of safety and placed herself within reach of an approaching car, which struck her within a moment after she got there. "She had not been there more than a moment before the car struck her; just about the time she got there the car struck her," and it is undisputed that: "*I heard two toots of the whistle just about the time she was struck, and it was just a short time before she was struck.*" (R. p. 34.) Surely it cannot be said that the motorman should have anticipated that she would suddenly step out near the track, but the law is that he had a right to assume that she would not do so. This is too clear to require any citation of authorities.

The following cases, in addition to those above cited, sustain our contention that Mrs. Cothary was guilty of contributory negligence:

*Imler v. Northern Pacific Ry. Co.*, 47 Wash. Pac. 354, (Feb. 7, 1916).

- Gannaway v. Puget Sound T. L. & P. Co.*,  
77 Wash. 655, 138 Pac. 267;  
*Mey v. Seattle Electric Co.*, 47 Wash. 497,  
92 Pac. 283;  
*Kiely v. Seattle Electric Co.*, 78 Wash. 396,  
139 Pac. 197;  
*State, etc., et al v. Cumberland & W. Electric  
Ry. Co.*, 68 Atl. 197;  
*Bailey v. Market Street Cable Ry. Co.*, 42  
Pac. 914;  
*Hafner v. St. Paul City Ry. Co.*, 75 N. W.  
1048;  
*Jager v. Coney Island & B. R. Co.*, 32 N. Y.  
S. 304;  
*Atchison T. & S. F. Ry. Co. v. Schwindt*, 72  
Pac. 573;  
*South Covington, etc., Co. v. Beese*, 108 S. W.  
848, 16 L. R. A. (N. S.) 890;  
*Bryant v. Boston Elevated Ry. Co.*, 98 N. E.  
587;  
*Garvey v. Rhode Island Co.*, 58 Atl. 456;  
*Hayden v. Fair Haven, etc., Ry. Co.*, 56 Atl.  
613;  
*Widener v. West End St. Ry. Co.*, 32 N. E.  
899;  
*Ellsberg v. Honeck*, 68 Atl. 1091;  
*Wood v. Omaha & Council Bluffs Street Rail-  
way Co.*, 120 N. W. 1121;  
*Townsend v. Houston Electric Co.*, 154 S. W.  
629;  
*Smith v. Guff, etc., Ry. Co.*, 128 S. W. 1177;  
*Engler v. International Ry. Co.*, 122 N. Y. S.  
841.



In view of the undisputed facts that Mrs. Cothary was in a place of safety up till a moment before she was struck by the car, and that the motorman, according to all of the witnesses, blew the whistle just before striking her, it cannot be said that the plaintiff in error did not exercise ordinary care after Mrs. Cothary placed herself in a position of danger, and we submit to the Court that her conduct constituted contributory negligence, which bars a recovery in this case.

## ASSIGNMENT II.

The Court erred in admitting the testimony of Oscar Helander over the objection of the defendant relative to the condition of the turnstile about a week after the accident, without any additional proof that no change had taken place in the meantime, as follows:

“\* \* \* I didn’t find out what was the matter with the turnstile when I was there, but afterwards.”

Q. Well, afterwards, what did you find afterwards?”

Mr. OAKLEY: “I object to that question, unless he can tell when he found it, to see how near it is to the time.”

Mr. TEATS: Q. “When was it?”

A. “Well, it was sometime after the accident.”

Q. “About how long after the accident?”

A. “I think it was about a week after the accident.”

Mr. OAKLEY: "I object to that as being too remote."

The COURT: "Objection overruled; exception allowed. Only answer if you know from your own examination and observation, not from what somebody told you."

Mr. TEATS: Q. "What did you find?"

A. "I found one spoke of the turnstile was working almost against the other, or got down, or the whole turnstile had sunk down, rather, and that was the cause of the turnstile not going clear around." (R., pp. 31-'2.)

The testimony shows that the turnstile had been used by passengers of the street railway company during the entire day on which the accident occurred, also that the turnstile was maintained only for the use of passengers getting off the street car at that point. There was no testimony to show that the turnstile failed to work on the day in controversy, except in this particular instance.

In rebuttal plaintiff in error showed that the turnstile was in perfect condition on August 1st, a short time following the accident. (R., p. 66.)

The great weight of authority is to the effect that in actions of this character evidence as to the condition of the instrumentality causing the accident at a time subsequent to the accident is inadmissible unless supported by proof that no change had taken place in the meantime.

*The Edwin*, 87 Fed. 540;

*Brentner v. Chicago, etc., R. Co.*, 58 Ia. 625,  
12 N. W. 615;  
*Hoyt v. City of Des Moines*, 76 Ia. 430, 41  
N. W. 63;  
*Sullivan v. City of Syracuse*, 29 N. Y. S. 105;  
*Welsh v. Murray*, 37 N. Y. S. 882;  
*City of Chicago v. Early*, 104 Ill. App. 398;  
*Merchant's Loan & Trust Co. v. Boucher*, 115  
Ill. App. 101.

In the above cases the interval lapsing between the date of the accident and date of inspection was approximately the same time, or a shorter interval, than that in the present instance.

### ASSIGNMENT III.

The Court permitted defendants in error to read certain questions and answers from the testimony of the motorman Paul Jackson on one of the former trials of this case, over the objection of the plaintiff in error. The matter referred to is set out fully under the third assignment of error hereinbefore set forth in this brief, and we will not set out the matter in detail again. On pages 49 and 50 of the record is a full proceeding of what occurred while Jackson was on the stand, and on pages 76 to 80 of the record are the full proceedings at the close of the trial, when the testimony as given by Jackson at the former trial was read. It will be observed that nothing in the testimony of Jackson while on the witness stand justified the reading of the testimony during the former trial. The questions read

from his former testimony in no manner tended to change or qualify the testimony he had given during the last trial. The testimony could not have been given for the purpose of impeachment, and if it was so intended no grounds for impeachment were laid.

We therefore submit to the Court that the judgment of the trial court should be reversed and an order made directing the Court to grant the motion for directed verdict, and in case of the failure of this Court to so order, a new trial should be granted.

Respectfully submitted,

F. D. OAKLEY,  
Attorney for Plaintiff in Error.





United States Circuit Court  
of Appeals

FOR THE NINTH CIRCUIT

TACOMA RAILWAY & POWER CO.,  
a corporation,  
*Plaintiff in Error,*

vs.

WILLIAM COTHARY AND MARGARET  
COTHARY, husband and wife,  
*Defendants in Error.*

MOTION TO AFFIRM AND FOR DAMAGES  
AND BRIEF

**BRIEF OF DEFENDANTS IN ERROR**

UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

GOVNOR TEATS  
LEO TEATS  
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*Attorneys for Defendants in Error*

Postoffice Address:

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No. 2736

United States Circuit Court  
of Appeals

FOR THE NINTH CIRCUIT

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TACOMA RAILWAY & POWER Co.,  
a corporation,

*Plaintiff in Error,*

VS.

WILLIAM COTHARY AND MARGARET  
COTHARY, husband and wife,

*Defendants in Error.*

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MOTION TO AFFIRM AND FOR DAMAGES  
AND BRIEF

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**BRIEF OF DEFENDANTS IN ERROR**

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UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

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MOTION

Now comes the above named defendants in error  
and move this Honorable Court to affirm the judgment entered in the court below and for damages in



the amount of ten per cent. on said judgment on the ground that it is manifest that the writ of error sued out in this cause was for delay only and also that the questions on which the decision of the case depends, as set forth in the assignment of errors, are so frivolous as not to need further argument.

This motion is based upon the printed record herein and in conformity to subdivision 5 of rule 6 and subdivision 2 of rule 23 of Rules of the Supreme Court of the United States; also rule 8 of this Honorable Court making said rules of the Supreme Court applicable in such cases; also subdivision 2 of rule 23 of this Honorable Court.

#### TEATS, TEATS & TEATS

*Attorneys for Defendants in Error*

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#### ARGUMENT ON MOTION

A chronological statement of the proceedings from the time of judgment herein to the present time shows delay on the part of plaintiff in error is the main object of suing out the writ of error.

This cause was tried before two juries, the first disagreeing and the second returning a verdict in favor of the defendants in error in the sum of \$2450.00.

Judgment entered June 14th, 1915. (Rec. 12.)

Petition for new trial filed July 23rd, 1915.  
(Rec. 16), 39 days after entry of judgment.

Petition for new trial denied August 2nd, 1915.  
(Rec. 16.)

Order granting 60 days from August 2nd, 1915,  
within which to file proposed bill of exceptions.  
(Rec. 17.)

Proposed bill of exceptions filed September 28th,  
1915.

Final bill of exceptions filed December 28th,  
1915, after the signing of the order settling the  
same. (Rec. 97.)

Assignment of errors filed December 13th, 1915.  
(Rec. 102.)

Petition for writ of error filed December 13th,  
1915.

Order allowing writ of error filed December  
13th, 1915.

Bond on writ of error filed December 22nd,  
1915.

Writ of error filed December 28th, 1915.

Transcript of record filed in this Honorable  
Court January 15th, 1916.

This record shows each step taken was practi-

cally upon the last day of grace in each instance.

## FRIVOLOUS ERRORS ASSIGNED

There are only three assignments of error:

*1st.* The court erred in refusing to grant defendants' motion for a DIRECTED VERDICT upon each and every one of the grounds set forth in the motion.

Each and every question involved was purely for the jury and I will not take up the time or space to reprint any of the evidence as it does not require any explanation. A casual reading of the evidence printed in the record is all that is necessary to see how frivolous this assignment is.

*2nd.* Error in admitting testimony of Oscar Helander who was with Mrs. Cothary at the time of the injury and attempting to go through the turnstile which stuck and held them out on the platform for only a few moments and until the accident occurred. He went to the turnstile about one week after the accident and the court permitted him to tell what he found which held the turnstile from turning and preventing Mrs. Cothary and the witness and his wife from passing through. The grounds of objection was that the testimony was too

remote. (Rec. 31-32.)

We submit this evidence was competent, as the witness states he went to see why the turnstile refused to revolve.

A few days later, on the 1st day of August, the carpenter of the plaintiff in error testified he went there and found the gate in perfect condition (Rec. 66-7) except that he found the ratchet raised with a spike driven into it so that the gate could be turned either way and he put in some new spindles to replace the broken ones.

*3rd.* The third assignment of error is in permitting the plaintiff below to read the testimony of one Paul Jackson given at a former trial of the case for the purpose of impeachment without laying proper grounds for impeachment questions. To understand that point it will be necessary to quote the testimony at this, the second trial.

After describing what he did, while running his car down towards the turnstile, he states "I then put on the emergency brakes and then ran down past the stile and struck her and then ran two car lengths beyond."

Q. So that when you stopped, you had traveled from the point of collision three car lengths of



that car before you stopped?

A. No, sir, I won't say it was that far.

Q. Didn't you say so in your testimony before?

A. I don't remember of it.

Q. The length of that car is about forty-five or fifty feet?

A. Yes, sir.

Q. And the distance that your car stopped, the rear of your car was then about one hundred feet beyond the point of collision, wasn't that the fact?

A. That would make the rear end two car lengths from the time I hit her.

Q. That would make the rear end two car lengths, or about one hundred feet beyond the point of collision, isn't that a fact?

A. No, sir. I wouldn't say that the car was one hundred feet from the time that I hit her.

Q. And the point of your car was three lengths from the point of collision, isn't that a fact?

A. No, I would not say that either.

Q. Or about one hundred and fifty feet?

A. No, sir.

Q. And didn't you so testify in the trial before?

A. I don't remember saying the rear end of the

car was two car lengths from the place where I hit her.

Q. (Reading.) "Q. You were the length of two cars past this turnstile before your car stopped?

A. Yes, sir.

Q. That is, the rear of your car was two car lengths away from the turnstile?

A. About that."

Q. Didn't you answer that way?

A. I do not remember of it.

Q. Don't you remember that was your testimony before?

A. That may have been my testimony, but I don't remember all the statements which I made.

Q. Isn't that the testimony that you gave here before on the trial of this case?

A. It may have been; I do not remember.

Q. "Q. That would be three times forty-five or one hundred and thirty-five feet after you passed the turnstile before you stopped your car?

A. From where I was? Q. Yes. A. It would be around that some place." Isn't that what you testified to?

A. I could not say as to that. Of course, if it

is down on paper, it may have been.

Q. Don't you remember now that is the way you testified before?

A. I could not say that it is.

Q. Don't you remember now that is about the facts of the case as far as you remember?

A. I remember something about two car lengths, but I don't remember whether it was the rear end or not."

Then to clear up that matter as to what was the testimony of the witness at the former trial, he stating that he did not remember and testifying differently at this the second trial, the plaintiff below introduced and had read from the notes questions and answers set forth in assignment of error No. 3, which proceedings are fully set forth at pages 76 to 80 inc. of the record.

The assignment of error certainly is frivolous.

We submit the record shows this writ of error was sued out for delay and the rule should be enforced affirming the judgment and imposing a penalty of ten per cent. as provided by section 1010 of the Revised Statute and the rule of this Honorable Court and of the United States Supreme Court.

*Gregory Const. Mining Co. vs. Starr*, 11 Sup.  
Crt. Rep. 914.

*Chicago Ry. vs. Bomberger*, 130 Fed. 884.

*Texas vs. Volk*, 14 Sup. Crt. Rep. 239.

*Pennsylvania Company vs. Donat*, 36 Sup.  
Crt. Rep. 4.

Respectfully submitted,

GOVNOR TEATS

LEO TEATS

RALPH TEATS

*Attorneys for Defendants in Error*





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# In the United States Circuit Court of Appeals for the Ninth Circuit

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TACOMA RAILWAY AND POWER  
COMPANY, a corporation,  
*Plaintiff in Error,*

VS.

WILLIAM COTHARY and MAR-  
GARET COTHARY, husband and  
wife,

*Defendants in Error.*

No. 2736.

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PLAINTIFF'S IN ERROR ANSWER BRIEF ON  
MOTION TO AFFIRM.

---

FRANK D. OAKLEY,

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Postoffice Address,

Perkins Bldg., Tacoma, Wash.

Filed

F. D. Monckton  
Clerk



# In the United States Circuit Court of Appeals for the Ninth Circuit

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TACOMA RAILWAY AND POWER  
COMPANY, a corporation,  
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No. 2736.

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PLAINTIFF'S IN ERROR ANSWER BRIEF ON  
MOTION TO AFFIRM.

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## ARGUMENT

Defendants in error's motion to affirm, and for damages, is based upon the theory that the writ of error sued out in this cause was for delay only, and that the assignments of error are frivolous.



The motion seems to be based entirely upon the fact that the writ of error was not sued out within a few days after the trial of the case. The transcript of the record on file in this case shows that the verdict was returned June 11th, 1915, and judgment entered thereon June 14th, 1915. The transcript of record was filed in this Honorable Court January 15th, 1916,—several weeks prior to the time during which plaintiff in error had a right to file its petition for the writ of error. Certainly this cannot be considered by the Court as showing any disposition to delay the case. We call the Court's attention further to the fact that the proposed bill of exceptions was filed September 28th, 1915, and defendants in error filed amendments to the proposed bill of exceptions, nearly as large as the proposed bill of plaintiff in error, and the same was not finally settled, owing altogether to the attitude of defendants in error in settling the same, until December 28th, 1915. The writ of error was then filed, and a transcript of record ordered printed by the Clerk of this Honorable Court.

This case is now ready for argument in the May term of this Court, and could not have been set for argument during the last term. Certainly no claim that plaintiff in error attempted to delay this case can be based upon the record, which shows that in every instance the necessary proceedings

for obtaining a rehearing of this case by writ of error were taken well within the time provided therefor by law. They state in their argument upon the motion that "each step taken was taken upon the last day of grace in each instance." The rules of Court upon which this motion is based certainly do not contemplate a motion to dismiss when that is the only argument set forth as grounds therefor.

The second grounds for motion is that the three assignments of error are frivolous and require an affirmance of the judgment. We call the Court's attention to the fact that this case was tried in the State Court, and the trial judge held that under the laws of this State there could be no recovery, whereupon the plaintiffs started this action again in the United States District Court, for the Western District of Washington. We made a motion for a directed verdict upon the trial, which was denied. We believe that there is ample testimony in this case which will satisfy the Court that the plaintiff was a mere licensee at the place of the accident and was guilty of contributory negligence of the grossest kind, and that a directed verdict should have been granted as requested. It would require a discussion of all of the testimony in this case as to the merits which cannot be presented upon a motion of this character.

The Court also admitted testimony of a witness as to the condition of the turnstile in controversy one week after the accident, without any evidence whatever to show that the turnstile was in the same condition on the day of the accident, and other testimony showed that the turnstile was being used by passengers from cars of plaintiff in error during the day. We will cite cases to the Court which sustain our contention in this respect. This is a matter which we think upon the bare statement of the question involved will satisfy the Court that the point involved should be submitted to them, and the authorities sustaining position of plaintiff in error brought to the Court's attention.

The third assignment of error is that the Court permitted the defendants in error to read the testimony of one of plaintiff in error's witnesses on a former trial, without laying any grounds for impeachment questions. The brief on this motion by defendants in error relative to this point contains a very garbled statement of but part of the testimony. It is one of the elementary rules of evidence that it is necessary to lay proper grounds before impeaching questions can be asked; this was not done or attempted to be done in any manner required by law. This is not a frivolous assignment, and will be brought to the Court's attention by the proper authorities sustaining this assignment of error.

The Supreme Court of the United States has held in many cases that it is not proper on motion to dismiss an appeal or to affirm a judgment to decide what questions may be involved on the hearing of the appeal, and that "questions of reversal or affirmance appertaining to the merits of a controversy will not be determined on the motion to dismiss the appeal."

*Hill vs. Chicago & E. R. Co.*, 129 U. S. 170;

*Bohanan vs. Nebraska*, 118 U. S. 231;

*New Orleans and O. & G. W. R. Co., vs.*

*Morgan*, 10th Wall. 256.

The cases cited in defendants in error's brief fail to support their contentions in this case. The facts in this case are that the assignments of error are meritorious and a brief in support of the writ of error will be filed shortly with the Clerk of this Honorable Court. The defendants in error ask the Court in this case to go through the entire record to determine the merits thereof upon this motion which, if permitted to prevail, would deny every plaintiff in error the right to present its assignments of error to this Court in anything like a satisfactory manner, and without an opportunity to cite any authorities in support of its contentions.

We call the Court's attention to subdivision 5 of Rule No. 6 of the Supreme Court of the United States, where it says that in order to entertain a motion of the kind made by plaintiff in error in



this case it must be "*manifest* that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depends are so frivolous as not to need further argument." The assignments of error in this case certainly cannot be considered as the kind contemplated by this rule. We therefore pray the Court to deny the motion herein presented by defendant in error.

Respectfully submitted,

FRANK D. OAKLEY,

*Attorney for Plaintiff in Error.*

Postoffice Address,

Perkins Bldg., Tacoma, Wash.

United States Circuit Court  
of Appeals

FOR THE NINTH CIRCUIT

TACOMA RAILWAY & POWER CO.,  
a Corporation,

*Plaintiff in Error,*

VS.

WILLIAM COTHARY AND MARGARET  
COTHARY, husband and wife,

*Defendants in Error.*

**BRIEF OF DEFENDANTS IN ERROR**

UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION.

GOVNOR TEATS  
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Filed  
MAY 10 1910  
P. O. MURKIN  
CHS.



EXHIBIT "B"







No. 2736

United States Circuit Court  
of Appeals

FOR THE NINTH CIRCUIT

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TACOMA RAILWAY & POWER CO.,  
a Corporation,  
*Plaintiff in Error,*

VS.

WILLIAM COTHARY AND MARGARET  
COTHARY, husband and wife,  
*Defendants in Error.*

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**BRIEF OF DEFENDANTS IN ERROR**

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UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION.

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STATEMENT OF THE CASE

The injuries to the plaintiff, Mrs. Cothary, occurred in the Point Defiance Park in the City of Tacoma on the 20th day of July, 1913, through the

negligence of the Tacoma Railway & Power Company. The street car company does not own the ground and is simply given a franchise or license to operate its street car into the park the same as upon a public street. This license was given by Ordinance No. 2389 of the City of Tacoma, the material part of which is as follows:

“Sec. 1. That there be and is hereby granted to the Tacoma Railway & Power Company, its successors and assigns, the *license, right and privilege* to construct, operate and maintain a line of double track, electric street railway, together with the necessary poles and wires for electric purposes within Point Defiance Park subject to the rights of the government of the United States in and to said premises; the rights and privileges herein granted to said Tacoma Railway & Power Company, being as hereinafter set forth and none other.

Sec. 3. At the terminus or loop of said railway and for a distance along the main line, to be agreed upon by said Railway Company and the Board of Park Commissioners, the said Railway Company shall construct and maintain a wire fence six feet high, with suitable gates and turnstiles for the protection of the public in getting on or off the cars.”

The street car company erected the platform and

the turnstile shown in the cut (exhibit B) which permits people to go through from the park into the bath house seen in the cut just beyond the turnstile. There were no restrictions on the people traveling anywhere along the line of the street car company or using the tracks for any purpose and during July and August more people visit the part than at any other time, 400 to 500 people visit the bath house of an evening. (Rec. 40.) They used the way along which the track ran as a public street. (Rec. 41.) The people over in the main part of the park, wishing to go to the bath house, go down the path which extends along the fence until they reach the embankment where the grade or cut is made for the street car tracks, along the street car tracks to the turnstile, through the turnstile into the bath house. This was the course taken by the defendant in error, Mrs. Cothary, and her friends, Mr. and Mrs. Helander, when they took her to the bath house to see the sights. When they reached the platform shown in the cut, they walked on to the turnstile expecting to go through as the Helanders had repeatedly done so. Mr. Helander led the way, went to go through the right hand side of the turnstile when it caught and would not turn and Mrs. Helander was next, she passed around to the left hand



side of the turnstile and jiggled it a little when Mrs. Cothary stepped in front of the turnstile and tried to assist to turn it. As they were doing this a street car of the plaintiff in error came down the incline without ringing any bell or sounding any alarm and struck Mrs. Cothary on the right side, hip, shoulder and on the inside of the left knee, the left leg extending out further from the body, producing the injuries. None of the three at the turnstile heard the car and the car did not whistle until at the immediate time of the collision. They did not intend to stop there. Mrs. Cothary had been raised near railroad tracks and certainly had been trained to pay some attention to the approach of trains. (Rec. 23.)

Mrs. Cothary:

“I could not tell how close to the track I was. I was trying to get through there and trying to turn that around, I supposed it was a safe place to be and supposed I could hear a car coming but I didn’t. Yes, I was paying attention, I was going to go right through the gate; when we found the gate would not revolve that way we were all trying to work it loose when I got hurt.” (Rec. 23.)

“I looked back to see whether a street car was near or not or coming as I stepped on the

platform, I turned round and looked up the track. I was there for just a short time, I was expecting to go right through the gate and did not look back again. I didn't know I could not get through the gate \* \* \* I didn't pay any attention to the distance that my body was from the railroad track as I stood there because I expected to go through the gate. I was there a very short time. We were not pushing very long when it occurred. I didn't see the street car or hear it until it struck me. I heard two toots just as it struck me." (Rec. 25.)

"I didn't attempt to ascertain whether or not a street car was coming from the time I looked back, I didn't think a street car could be there. We were just going right through." (Rec. 26.)

The end of the spindle was projecting towards the track and is four feet away from the track. The car extended over the rail towards the turnstile 18 inches. Mrs. Cothary stood at the end of the spindle towards the track as shown in the cut.

Oscar Helander:

"I was leading and when I came to the gate it stuck. My wife came right behind and she went to the other side of the gate and said, 'Let us try it the other way,' and then Mrs. Cothary got between us, in front of the turnstile; so we got it a quarter of the way around, that was all we could do. We

could not get in from there; it was impossible to get it open enough to go through and the moment we got together there the car came. I heard a whistle and the same moment it struck her and I should judge it took about a second for the car to pass and there was a cloud of dust following the car so I couldn't see where she landed. \* \* \* After we had reached the platform we didn't look to see whether there was a car coming; we proceeded right ahead some distance before we struck the platform we looked. I thought it was perfectly safe there, and went the first thing to the gate. We were not expecting to stop on the platform at all." (Rec. 29-30.) I didn't find out what was the matter with the turnstile when I was there but afterwards. \* \* \* I think it was about a week after the accident I found one spoke of the turnstile was working almost against the other or dropped down, or the whole turnstile had sunk down rather, and that was the cause of the turnstile not going clear around. (Rec. 31-32.)

"There was no other whistle blown except those two that I heard at the time of the accident. I have had experience in railroading, I was fireman for 10 years and I can tell about the rate of speed a car is going when it passes me. That car was going from 30 to 35 miles per hour." (Rec. 35.)

Paul Jackson:

"I was the motorman in charge of the car

that struck Mrs. Cothary. Then as I was coming out of the first curve I noticed some people standing on the platform at the bath house. They didn't look to be in any danger from where I was. The car went down with a slight application of air to set the brakes, but when I got within a car length or two of the platform, I noticed that one lady was in danger. \* \* \* (Rec. 46.)

“When I came down the line and reached 54th street I stopped. It is a regular stop and then got a bell to go on, which is necessary to go ahead. It is down hill to the platform, but the grade is not quite so steep when we start at 54th street as it is just before we reach the platform. We start the car with the juice and then when the car gets headway, throw off the juice and let it roll down. It will roll on down clear to the park without any further juice and that is the way I did on this day. I threw off the juice as I was going out of the first curve, that is the curve just inside of the park from 54th street. When I came down the line and reached 54th street I stopped. Here exhibit “E” is marked with figure 1 in circle. Then the curve goes on down to the point which is marked on the exhibit figure 2 in the circle with red lead pencil. When you get out of the curve that is at figure 2 then strike a tangent, I couldn't say as to the distance between the two, but it is several hundred feet to the point marked figure 3 in the circle,



which is another little curve; it is about the same as the others was, and as you reach the second curve the grade is a little bit steeper, and then you reach the end of the curve at figure 4 marked in red lead pencil in the circle. Then it is a tangent down to the platform. The grade then commences about a car length or two from the other side of the platform, which would be about the switch. At the point marked with a caret in red lead pencil, then there is an up-grade in the loop. I first saw the people on the platform as I was coming out of the first curve. To the best of my recollection the man and one lady were standing in close to the stile and the other lady was standing out closer to the track when I first saw them. It looked like they were standing there in conversation at the stile, right opposite the stile, to the best of my recollection from the time I first seen them until the car struck her. I don't remember that they were standing there as seen in exhibit "B." They may have moved but I never noticed them. It is my duty to look ahead and see where there is any danger on the track or people near the track, that is part of my duty as a motorman, and when I came out of the first curve I looked down to see if my way was clear and I let my car roll on down hill. And then when I came out of the second curve I saw that Mrs. Cothary was in danger." (Rec. 47-48.)

Of course he then went on to state that he blew

the whistle and did everything he could to stop the car, but the jury could not have believed him in that regard, and his testimony on cross-examination in the record at pages 49 to 61 inclusive warrants the jury in not believing his testimony. At this trial Jackson stated that after striking Mrs. Cothary his car stopped two lengths beyond, that is, his car ran two lengths of itself, 90 or 100 feet, when it stopped. At the former trial he testified that the rear of his car was two lengths away from the turnstile, making the car run three lengths or about 150 feet after the collision. (Rec. 49-50 and 76-80 inc.)

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## ARGUMENT

Boiled down, we have two licensees in the public park of Tacoma, one a street car running on a fixed track, and the other a pedestrian: the one running on the track has the right of way while using the track and the pedestrian must give way because the street car cannot turn from the track; their rights are reciprocal the same as on a public highway. Then we have the pedestrians leaving the track, getting from the space that must be occupied by the street car and not intending to again get near the

track and but for the turnstile sticking and refusing to turn and let them through to the bath house, they would have kept on their way leaving the track behind. But the turnstile stuck. They were held on the platform and for a moment tried, as a matter of course, to turn the turnstile the other way in their efforts to get through, and while occupied in their efforts to get through, the street car came down the hill 30 to 35 miles an hour, without warning and unknown to them, striking Mrs. Cothary and injuring her for life. The motorman saw them at the turnstile a long way off and as he entered the tangent that led to the platform saw Mrs. Cothary in a place of danger and did nothing to avert the accident.

Did Mrs. Cothary and the Helanders use ordinary care at that time was a question for the jury to decide. Did the motorman running his street car use ordinary care, either in running his car at that high rate of speed, in failing to warn them of the danger or in failing to stop his car were also questions for the jury to decide. The jury answered these questions in favor of Mrs. Cothary after a fair trial and the law fully and correctly given them. I might say by way of parenthesis that the

argument set forth in brief of plaintiff in error is the first and only argument it has made in support of its motion for directed verdict.

Under the evidence in this case the circumstances surrounding Mrs. Cothary were such that there could not have been any fixed standard of duty and there was no duty defined by law upon which a directed verdict could be based.

The facts as to what she should have done were not such as to conclude but one reasonable inference necessary upon which a directed verdict should have been granted.

“There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law \* \* \*. The first is where the circumstances of the cases are such that the standard of duty is fixed and the measure of duty defined by law and is the same under all circumstances \* \*. And the second is where the facts are undisputed and but one reasonable inference can be drawn from them.”

*MacQuillan vs. Seattle*, 10 Wash. 464;

*Budman vs. Seattle Elec. Co.*, 61 Wash 281.

Budman was shoveling gravel on a street car track. All other cars passing him had



rung the bell notifying him of their approach but the one that struck him did not. A verdict for the plaintiff was set aside and judgment notwithstanding the verdict entered against him. The case was reversed by the Supreme Court with instructions to enter judgment on the verdict.

In commenting upon the case of *May vs. Seattle Elec. Co.*, 47 Wash. 497, cited and relied on by plaintiff in error in this case, the court said:

“We hardly see how the doctrine announced in this case, where the cars had no notification of the presence of a pedestrian on their tracks, where there was no duty owing to the pedestrian excepting to travel within the time prescribed by the law, to keep the ordinary lookout and to protect the pedestrian after he was discovered upon the track if possible, but where the duty was upon the pedestrian to keep off of the track at the place where he was injured and where he had an opportunity to keep off of it and still pursue his journey, can have any application to the facts of this case.”

The same comment can be made in this case as Mrs. Cothary was not walking along the tracks but was at a place where she expected to go away from the track before and at the time of being struck. This Honorable Court has recognized the rule quoted above in several street car cases but under circum-

stances stronger against the injured person than circumstances in this case.

*Hays vs Tacoma Ry. & Power Co.* 106 Fed.  
48;

*Tacoma Ry. & Power Co. vs. Hays*, 110 Fed.  
496.

In this latter case the court said:

“The question of negligence is generally one of fact for the jury. It is only where the facts and the inferences to be drawn therefrom are such that all reasonable minds must reach the same conclusion that the question is ever considered one of law for the court. There is no fixed standard in the law by which a court is enabled to say arbitrarily in every case where the line must be drawn between negligence and ordinary care. What may be deemed ordinary care in one case may, under different circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether

there was negligence or not, the determination of the matter is for the jury.”

*Seattle Elec. Co. vs Hovden*, 190 Fed. 7.

Plaintiff crossing two railroad tracks looked about 400 feet distant and saw a car. She then passed behind a stationary car when she was struck by the car she had seen 400 feet away and was injured.

“A pedestrian in crossing a street railway track is not bound to take such precautions as are demanded by one who crosses a railroad track, hence a trespasser on the right of way of a street car company is not bound by any strict rule of law as when he approaches a steam railroad crossing to stop, look and listen or to take special precautions to determine whether there is danger in going upon the track.”

The same rule was applied by this Honorable Court in *Tacoma Ry. & Power Co. vs. Remmen*, 220 Fed. 617.

The rule announced in this case, which is the generally accepted rule in street car cases, is to the effect that when one is crossing a street car track going into a place of possible danger, he must observe and use ordinary care. If he has done that, he has fulfilled the law governing his conduct.

Had Mrs. Cothary been struck by a car while

crossing the tracks to the platform under circumstances described in these cases, even then the question of contributory negligence on her part would be for the jury to decide. But she had crossed the track, she had gone beyond the point of danger. She had reached the platform made and provided for people when she looked and saw no car and thinking no more about danger because she was out of danger, she proceeded down to the turnstile to go into the bath house when her way was obstructed by the defective turnstile. Her attention was on the efforts of the three in trying to pass through the turnstile when the accident happened. There certainly can be no fixed rule as to her conduct at that turnstile. Should she have looked again before going to the end of the spokes to help turn the stile is a debatable question. She was not going into any place of known danger. She was not expecting a car and her mind was upon the turning of the turnstile which she thought, and which all of them had a right to think, would check and hold them there only for a moment and then they would go on through. They were trying to discover why the turnstile stuck. It stuck and while attempting to make it go the accident occurred.

Now the plaintiff in error has cited a long list



of cases, none of which are in point. Before taking up the cases cited I wish to refer to the charge that Mrs. Cothary was a licensee. The evidence does not bear out that fact. She had as much right on that platform as the street car had in operating its line into the park; but in fact it is immaterial in this case whether she was a licensee or not for the motorman saw the parties at the stile long before he reached the tangent and when he reached the tangent, a distance of about 150 feet away from Mrs. Cothary, he knew she was in danger and did nothing, under our evidence, to warn her as was his duty to do. And the jury so found.

The cases cited by plaintiff in error need only to be glanced at to see that they are not in point.

*The N. P. Ry. Co. vs. Jones*, 144 Fed. 47.

Jones was walking on the railroad track up a canyon where the noise of rushing water was such that he could not hear the train that struck him. He was in a place of danger.

“The plaintiff voluntarily placed himself in a place of danger from which he has present means of escape and continued there without exercising precautions which an ordinary prudent man would exercise. We have nothing here to do with the law appli-

cable to the case where the injured person is found in a place of danger, as upon a railroad trestle from which he is powerless to extricate himself upon the approach of a train and where his situation is discovered or should have been discovered by those in charge of the train.”

*Ry. vs. Cook*, 66 Fed. 115.

A trespasser in railroad yards injured by the ordinary switching of cars.

*Felton vs. Aubrey*, 74 Fed. 350.

An infant trespassing on the tracks. Railroad not liable unless after the discovery of his presence on the track, it has failed to use ordinary care to avoid injury.

*Gardner vs. Trumball*, 94 Fed. 321.

Child two years of age strayed upon the track and was killed by a passing train. Non-suit granted, reversed and held as a matter of law that the parents were not guilty of contributory negligence, but the question was one for the jury.

*Ry. vs. McClish*, 115 Fed. 268.

McClish was killed while walking along the tracks between two trains.

*King vs. Ry.*, 114 Fed. 855.

King was run over in railroad yards while the company was switching cars.

*Ry. vs. Mosley*, 57 Fed. 921.

Plaintiff was injured in railway yards. Statute forbids strangers from walking in yards on railroad tracks. He stepped from one track to avoid a train, walked 300 feet on the next track and was struck by an engine.

*Hart vs. N. P.*, 196 Fed. 180.

Hart, a drover, went to talk with the conductor of his train in the railway yards and did not watch out for trains and was struck.

*Morgan vs. N. P.*, 196 Fed. 449.

Morgan on a very dark and windy night went upon the railroad bed between the tracks and then went upon the middle of one of the tracks and was struck by a train.

*Kaiser vs. N. P.*, 203 Fed. 933.

Kaiser with a companion was walking through the railroad yards, saw an engine approach, coming at 6 or 8 miles an hour and then crossed over two or three tracks and the engine crossed over and struck him.

*Garlich vs. N. P.*, 131 Fed. 837.

Garlich without any occasion was walking between the tracks, saw an engine, went over to a track and walked 150 feet and was struck before he looked again.

*Ry. vs. Summers*, 173 Fed. 358.

Railroad crossing case. Verdict below

for the plaintiff and case reversed on the grounds of improper instructions.

*Gannoway vs. St. Ry.*, 77 Wash. 655.

Plaintiff had alighted from a street car upon a platform which was erected at a point where the car turned the corner of the street to pass at right angles. He did not notice the overhanging of the car when it rounded the curve which struck him. The conductor claimed he did not see the persons as they were walking too close to the track on the platform as it was dark, and the court said:

“Of course if he actually saw or discovered that they were in a perilous position in time to prevent an injury, by waiting until they had left the platform or by stopping the car after he had been directed to start, a different question would be presented but nothing of this kind appears in the record.”

*Meys vs. St. Ry. Co.*, 47 Wash. 497.

Meys went along over the tracks of the street car and did not look or observe. They held that he should have paid some attention to the dangerous position he was in.

*Kiely vs. St. Ry. Co.*, 78 Wash. 396.

A street worker engaged in cleaning sewers struck by a street car. Repeated gongs upon the car were sounded for a distance of 75 or 200 feet. He paid no attention to it.



*State vs. St. Ry. Co.*, 68 Atl. 197.

Party injured was riding in a wagon until he got about opposite his home. Wagon stopped and he got out on the hub, stood there and talked with the driver and then he stepped down off of the wagon close to the street car track. Nothing to draw his attention from the on-coming street car. He went towards the street car track into a place of danger without any occasion for it except his own convenience and was expecting to cross the track.

*Bailey vs. St. Ry.*, 42 Pac. 914.

An old lady standing between a couple of tracks. The car came along which she wanted to take; she stepped back on to the other track in front of a car only 10 feet away and was struck.

*Hafner vs. St. Ry.*, 75 N. W. 1048.

Hafner was at work on a street placing a plank alongside a street railway track. He did not notice the car which was coming and stooped over suddenly to turn the plank and was struck by the car.

“The evidence discloses no reason for his failure to so look. There was nothing to distract his attention. He knew the cars passed the place frequently, he was not frightened, bewildered or misled and the slightest care on his part for his own safety would have prevented his injury.” The motorman saw

the plaintiff 20 feet away when he was standing beside the track and the plaintiff suddenly stooped over and was struck.

*Jager vs. St. Ry.* 32 New York Supp. 304.

Jager was walking on a track, saw a car coming and did not get out of the road. Collision.

*Ry. vs. Schwindt*, 72 Pac. 573.

Schwindt was walking on a street car track where there was no occasion for it and was struck by a car without looking.

*St. Ry. vs. Besse*, 108 S. W. 848.

Besse was driving with a wagon around a curve of a street car track and so near that the swing of the car in turning the curve struck his wagon and threw him against the brake and injured him. No occasion for driving so close to the track at the curve.

*Bryant vs. St. Ry.*, 98 N. E. 587.

Bryant was walking on a sidewalk at a point of a sharp curve. A vehicle was being driven close to the track at the curve and was struck by the overhang of the street car as it rounded the curve. Held driver and street car company both liable.

*Garvey vs. St. Ry. Co.*, 58 Ata. 456.

Garvey stood at a curve waiting for a car. Car came along, swung around the

curve and struck him. He stood too close to the track while waiting for his car.

*Hayden vs. St. Ry.*, 56 Ata. 613.

Hayden was hit by a car running around a curve. Case submitted to the jury, which returned its verdict for defendant.

*Widmer vs. St. Ry.*, 32 N. E. 899.

Plaintiff was standing near the track at a curve waiting for her car. She saw the car come. She was looking north at some teams while the car was coming from the south and saw the car go by her and thought she was far enough from the track, but was struck by the handle on the rear dasher of the car as it went around the curve.

*Woods vs. St. Ry.*, 120 N. W. 121.

Woods was standing waiting for a car, saw the car coming, but stood too close and was hurt on a straight track.

*Townsend vs. St. Ry.*, 154 S. W. 692.

Townsend was waiting for a car at a curve, saw the car coming, got too close to the track and was hit by the overhang of the fender.

*Smith vs. Ry.* 128 S. W. 1177.

Smith was at a flag station of the railway. Stepped on to the track to flag the train by a lighted match held in his hand. Saw the train coming but didn't get out of

the way and was struck.

Again we submit that there is no case cited by plaintiff in error applicable to this case. Or, perhaps, to be more charitable, the majority are absolutely not in point and the small minority are easily distinguishable.

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## ASSIGNMENT NO. 2

Oscar Helander, one of the party at the turnstile, who testified about the turnstile sticking and refusing to turn and let them through, further testified that about a week afterwards he went to the turnstile to see why it stuck and did not let them through and said:

“I found one spoke of the turnstile was working almost against the other or got down or the whole turnstile had sunk rather and that was the cause of the turnstile not going clear around.”

The cases cited by plaintiff in error are not similar to this case. Here was a condition at the time of the accident. The turnstile was constructed and maintained by the plaintiff in error. About a week



after the accident, the witness went to see the cause of the turnstile sticking and found it. The fact that the turnstile on August first, which was after Helander looked at it, was in good condition only showed that it had been repaired after Helander saw it. He is not disputed as to the conditions he found at the time of the accident and at the time of his inspection. It was in the power of the street railway who constructed and maintained the turnstile to know all about the conditions, so the rightful conclusion is that the condition which caused the turnstile to stick remained the same from the time of the accident to the time Helander inspected it.

Wigmore, discussing this subject, Vol. I, Sec. 437, of his work on Evidence, says:

“That no fixed rule can be prescribed as to the time, or the conditions, within which a prior or subsequent existence is evidential is sufficiently illustrated by the precedents from which it is impossible (and rightly so) to draw a general rule. They may be roughly grouped into two classes—those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which a preliminary showing is required. Whether it should be

required must depend entirely on the case in hand, and it is useless to look to or wish for any detailed rules. \* \* \*

See also *Ry. Co. vs. Brown*, 71 Ata. 1005.

*Brooks vs. Winters*, 39 Md. 509.

6th Thompson's Negligence, Sec. 7870.

8th Thompson's Negligence, Sec. 7870.  
(White Supp.) and cases cited.

*Alcott vs. Public Service Cor.*, 32 L. R. A.,  
(N. S.) 1084, and extended note.

As stated in the cases if the condition was different during this interim and the appliance being under the control of the plaintiff in error it could have shown that difference in condition in rebuttal.

But the real question in the case as to the turnstile is, did it stick and prevent the defendant in error and her party from going through, which is only an incident, a condition applicable to the case. The reason why it stuck was only incidental and explanatory.

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### ASSIGNMENT NO. 3

We have set out in our brief on our motion to

affirm, etc., the testimony of Paul Jackson in cross-examination in relation to the place where his car stopped after striking Mrs. Cothary which he stated at this trial to be two car lengths or about 90 feet. At the former trial he stated that it was three car lengths or 135 feet. He would not state whether he testified so in the former trial or not, simply said "I don't remember," but held to the two car lengths at this trial and so the court held in answer to the objection of Mr. Oakley.

THE COURT: "While counsel would have the right to make him admit that he had testified formerly so and so if it was at all at variance or claimed to be at variance with what he testifies now, if he simply says that he did not remember it, it is substantially a denial and on the other side, does not get the benefit of his admission if he made an admission."

See Record, pages 76 to 80 inc.

We still insist that the Writ of Error sued out in this case was for delay only and that our motion to affirm and for damages should be sustained.

Respectfully submitted,

GOVNOR TEATS  
LEO TEATS  
RALPH TEATS

*Attorneys for Defendants in Error.*

P. O. Address 1216 Fidelity Bldg.  
Tacoma, Washington.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

Maryland Casualty Company of Baltimore, Maryland,  
a corporation,

*Plaintiff in Error,*

VS.

ORCHARD LAND AND TIMBER COMPANY, a  
corporation,

*Defendant in Error.*

---

**TRANSCRIPT OF RECORD**

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Upon Writ of Error to the District Court of the United  
States for the District of Oregon.

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**Filed**

FEB 24 1918

**F. D. Monckton,**  
Clerk.





No. \_\_\_\_\_

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IN THE

# United States Circuit Court of Appeals

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## TRANSCRIPT OF RECORD

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Upon Writ of Error to the District Court of the United  
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*United States Circuit Court of Appeals for the Ninth  
Circuit.*

Maryland Casualty Company of Baltimore, a corporation,  
tion,

*Plaintiff in Error,*

vs.

Orchard Land and Timber Company, a corporation,

*Defendant in Error.*

**NAMES AND ADDRESSES OF THE ATTOR-  
NEYS OF RECORD.**

Wilbur, Spencer & Beckett,

Board of Trade Building, Portland, Oregon, for  
the Plaintiff in Error.

Clark, Skulason & Clark,

Yeon Building, Portland, Oregon, and Charles A.  
Hardy, Eugene, Oregon, for the Defendant in  
Error.

## CITATION ON WRIT OF ERROR.

United States of America,  
District of Oregon,—ss.

To Orchard Land & Timber Company, a corporation,  
Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Orchard Land & Timber Company, is plaintiff, and Maryland Casualty Company, of Baltimore, Maryland, is defendant, plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 28th day of January in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN,  
Judge.

United States of America,  
District of Oregon,—ss.

Due and timely service of the within Citation on  
. Writ of Error, and the receipt of a duly certified copy

thereof, all at the City of Portland, in the District of Oregon, is hereby admitted.

Jan. 28th, 1916.

CLARK, SKULASON & CLARK,  
Attorneys for Plaintiff.

Filed January 29, 1916. G. H. Marsh, Clerk.

### WRIT OF ERROR.

*In the United States Circuit Court of Appeals for the  
Ninth District.*

Maryland Casualty Company, of Baltimore,  
Maryland, a corporation,

Plaintiff in Error,

vs.

Orchard Land & Timber Company, a corporation,

Defendant in Error.

THE UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED  
STATES OF AMERICA.

To the Judge of the District Court of the United States  
for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Orchard Land & Timber Company, a corporation, Plaintiff and Defendant in Error, and Maryland Casualty Company, of Baltimore, Maryland,

a corporation, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD  
DOUGLAS WHITE,

Chief Justice of the Supreme Court of  
the United States this 28th day of  
January, 1916.

(Seal U. S. District Court,  
District of Oregon.)

G. H. MARSH,  
Clerk of the District Court of the  
United States for the District of  
Oregon.

Filed January 28th, 1916. G. H. Marsh, Clerk United  
States District Court, District of Oregon.



*In the District Court of the United States for the  
District of Oregon.*

MARCH TERM, 1915.

BE IT REMEMBERED, That on the 29th day of March, 1915, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Complaint, in words and figures as follows, to-wit:

*In the District Court of the United States for the  
District of Oregon.*

AMENDED COMPLAINT.

ORCHARD LAND & TIMBER COMPANY, a  
corporation,

Plaintiff,

vs.

MARYLAND CASUALTY COMPANY of Bal-  
more, Maryland, a corporation,

Defendant.

For a cause of action against the defendant herein, the plaintiff alleges:

I.

That at all times herein mentioned, the plaintiff was, and now is, a corporation, duly organized, created and existing under and by virtue of the laws of the State of Oregon.

## II.

That at all times herein mentioned, the defendant was, and now is a corporation, duly organized, created and existing under the laws of the State of Maryland, and by its charter and ARTICLES OF INCORPORATION, authorized and empowered to transact a surety business, and to write, issue and put in force contracts of Employers' Liability Insurance; and during all the times herein mentioned, the said defendant was authorized to transact business in the State of Oregon, and to write, issue and put in force, contracts of insurance of the character stated.

## III.

On June 5th, 1912, and in consideration of the sum of \$140.00, then paid by the plaintiff to the defendant, the defendant did issue to the plaintiff its contract No. A-34208 by the terms of which, the said defendant did contract and agree to indemnify the plaintiff against loss from the liability imposed by law upon the plaintiff, for damages on account of bodily injuries, including death resulting therefrom, suffered by any employee of the plaintiff, while upon the premises, or upon the sidewalks, or other ways immediately adjacent thereto, provided for the use of the employees of the plaintiff or the public, and occupied by the plaintiff in the conduct of its business, within a period of 12 months beginning on the 5th day of June, 1912, and ending on the 5th day of June, 1913; and

It was further contracted and agreed, additionally that the kind or kinds of work, covered by the policy,

was work in and about the saw-mill and appurtenances, of the plaintiff located in Lane County, Oregon, and including employees whose duties required their presence in the mill or yards of the plaintiff.

#### IV.

It was further contracted and agreed by said contract of insurance, by and between the defendant and the plaintiff, that the contract liability of the defendant thereunder from any accident, resulting in bodily injury, including death resulting therefrom, to any one person, was \$5000.00; and in addition the defendant did contract and agree, at its own cost and expense, to investigate all accidents, and defend all suits of which notice was given to it, as by the terms of said contract of insurance provided, unless the defendant elected to settle any such claim or suit; and the said contract of insurance remained at all times in force during the period above stated.

#### V.

That on the 8th day of June, 1912, O. W. Dunn, was an employee of the plaintiff, and was employed in and about the aforesaid mill of the plaintiff, situated in Lane County, Oregon, engaged in and about the conveyor, or equipment, used to convey slabs from the saw-mill along a staging, or scaffolding, to a dump where the said refuse and slabs were to be and were burned. That the place where the said Dunn was working, was in and about the mill yard of the plaintiff; that on the said 8th day of June, 1912, and while so in the employ of the

plaintiff, and engaged in the aforesaid work, in and about the mill and yards of the plaintiff, the said Dunn was seriously injured.

## VI.

On October 9th, 1912, the said Dunn brought an action at law, in the Circuit Court of the State of Oregon, for Lane County, against this plaintiff, setting forth the injuries received, and praying for judgment against the plaintiff, in the sum of \$15,000.00, besides his costs and disbursements. That defendant was promptly notified of such injuries as required by the terms of said contract of insurance; when said action was brought defendant was promptly notified thereof, and the complaint and other papers in said cause was promptly transmitted to the defendant. The defendant did not settle said claim or action, but assumed entire charge and control of the conduct and defense thereof, under and pursuant to the terms of said contract of insurance, and in the name of this plaintiff, through its own Attorneys, the defendant did interpose and answer, to which answer the said Dunn interposed a reply, and thereupon the case being at issue, was duly and regularly brought on for trial and determination in the Circuit Court of Lane County, Oregon; that at all times the defendant, through its Agents and Counsel conducted and retained entire charge and control of the said cause, and the trial thereof. That thereafter such proceedings were had in said cause, that upon the 11th day of November, 1912, judgment in said cause was duly and regularly passed, rendered and entered in favor of the said Dunn,



and against this plaintiff, in the sum of \$7,500.00, and for his costs and disbursements, taxed and allowed in the sum of \$102.60.

## VII.

Thereafter the defendant declined to settle said claim and judgment or any part thereof, and took an appeal from said judgment to the Supreme Court of the State of Oregon, in the name of this plaintiff, the said defendant in truth and in fact, however, taking and retaining full charge and control of said cause, and the said appeal. Thereafter such proceedings were had in said cause upon appeal, that on December 9th, 1913, the said judgment was affirmed; that said judgment was never at any time modified, vacated or set aside.

## VIII.

That on or about the 11th day of November, 1914, the plaintiff settled said claim, and paid said judgment, and procured a release and satisfaction thereof. That plaintiff has duly kept and performed each and every term, stipulation and condition of said contract of insurance, to be by it kept and performed. That said plaintiff settled and procured a discharge of said judgment for the sum of \$7,602.60; that by reason of the aforesaid facts, plaintiff has suffered as a result of the injuries and the judgment rendered in favor of the said Dunn, in the sum of \$7,602.60. That by the terms of said contract of insurance, the defendant contracted and agreed to and with the plaintiff, to compensate, indemnify and reimburse the plaintiff in the sum of \$5,000.00, because of loss

imposed upon plaintiff by the said injuries, and the judgment rendered as a result thereof.

IX.

That defendant has failed, neglected and refused to indemnify the plaintiff in said sum of \$5,000.00, or any part thereof. That by reason of the facts aforesaid, defendant is indebted to plaintiff, in the sum of \$5,000.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$5,000.00, with interest thereon at the legal rate, and its costs and disbursements herein.

CLARK, SKULASON & CLARK,

Attorneys for Plaintiff.

District of Oregon,

County of Multnomah,—ss.

I, Alfred P. Dobson, being first duly sworn, depose and say that I am the secretary of plaintiff corporation in the above entitled action; and that the foregoing amended complaint is true, as I verily believe.

ALFRED P. DOBSON,

Subscribed and sworn to before me this 27th day of March, 1915.

HERMAN MOELLER,

(Seal) Notary Public for the State of Oregon.

District of Oregon,

County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 29th day of March, 1915.

S. C. SPENCER,

of Attorneys for Defendant.

Filed March 29, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 17th day of July, 1915, there was duly filed in said Court and cause, an Answer, in words and figures as follows, to wit:

ANSWER.

The defendant for answer to plaintiff's amended complaint, alleges, admits and denies as follows:

I.

Admits the allegations contained in Paragraph I thereof.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof.

IV.

Admits the allegations contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V of said amended complaint.

VI.

Admits the allegations contained in Paragraph VI of *said amended complaint*.

VII.

Admits the allegations contained in Paragraph VII of said amended complaint.

VIII.

Denies each and all of the allegations contained in Paragraph VIII of said amended complaint.

IX.

The defendant denies each and all of the allegations contained in Paragraph IX of said plaintiff's amended complaint, except that it admits that it has not paid the said plaintiff the sum of \$5000.00 or any other sum or amount.

For a further and separate answer and defense to said amended complaint, this defendant alleges:

I.

That during all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

II.

That during all the times hereinafter mentioned the defendant was and is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and by its charter and Articles of Incorporation was and is authorized and empowered to write, issue and put in force contracts of employers' liability insur-



ance and during said time was authorized to transact business in the State of Oregon.

### III.

That on June 5, 1912, and in consideration of the sum of \$140.00 then paid by plaintiff to the defendant, the defendant did issue to the plaintiff its employers' liability policy of insurance No. A 34208, by the terms of which, among other things, said defendant did contract and agree to indemnify the plaintiff against loss from liability imposed by law upon the plaintiff for damages on account of bodily injuries, including death, resulting therefrom, suffered by any employee of the plaintiff while upon the premises or upon the sidewalks or other ways immediately adjacent thereto, provided for the use of the employees of the plaintiff or the public and occupied by the plaintiff in the conducting of its business referred to in said policy within a period of twelve months, beginning with the 5th day of June, 1912, and ending on the 5th day of June, 1913, and it was further contracted and agreed additionally that the kind or kinds of work covered by the policy was work in and about the saw mill and appurtenances of the plaintiff located in Lane County, Oregon, and included employees whose duties required their presence in the mill or yards of the plaintiff.

### IV.

It was further contracted and agreed by said contract of insurance, by and between the defendant and the plaintiff, that the contract liability of the defendant thereunder from any accident, resulting in bodily in-

jury, including death resulting therefrom, to any person, was \$5,000.00; and in addition the defendant did contract and agree, at its own cost and expense, to investigate all accidents, and defend all suits of which notice was given, to wit, as by the terms of said contract of insurance provided, unless the defendant elected to settle any such claim or suit; and the said contract of insurance remained at all times in force during the period above stated.

## V.

That on the 8th day of June, 1912, O. W. Dunn, was an employee of the plaintiff, and was employed in and about the aforesaid mill of the plaintiff, situated in Lane County, Oregon, engaged in and about the conveyor, or equipment, used to convey slabs from the saw-mill along a staging or scaffolding, to a dump where the said refuse and slabs were to be and were burned. That the place where the said Dunn was working, was in and about the mill yard of the plaintiff; that on the said 8th day of June, 1912, and while so in the employ of the plaintiff, and engaged in the aforesaid work, in and about the mill and yards of the plaintiff, the said Dunn was seriously injured.

## VI.

On October 9th, 1912, the said Dunn brought an action at law, in the Circuit Court of the State of Oregon, for Lane County, against this plaintiff, setting forth the injuries received, and praying for judgment against the plaintiff, in the sum of \$15,000.00 besides his costs and disbursements. That defendant was promptly notified

of such injuries as required by the terms of said contract of insurance; when said action was brought defendant was promptly notified thereof, and the complaint and other papers in said cause was promptly transmitted to the defendant. The defendant did not settle said claim or action, but assumed entire charge and control of the conduct and defense thereof, under and pursuant to the terms of said contract of insurance, and in the name of this plaintiff, through its own Attorneys, the defendant did interpose an answer, to which answer the said Dunn interposed a reply, and thereupon the case being at issue, was duly and regularly brought on for trial and determination in the Circuit Court of Lane County, Oregon; that at all times the defendant, through its Agents and Counsel conducted and retained entire charge and control of the said cause, and the trial thereof. That thereafter such proceedings were had in said cause, that upon the 11th day of November, 1912, judgment in said cause was duly and regularly passed, rendered and entered in favor of the said Dunn, and against this plaintiff, in the sum of \$7,500.00, and for his costs and disbursements, taxed and allowed in the sum of \$102.60.

## VII.

Thereafter the defendant declined to settle said claim and judgment or any part thereof, and took an appeal from said judgment to the Supreme Court of the State of Oregon in the name of this plaintiff, the said defendant in truth and in fact, however, taking and retaining full charge and control of said cause, and the said appeal. Thereafter such proceedings were had in said cause upon

appeal, that on December 9th, 1913, the said judgment was affirmed; that said judgment was never at any time modified, vacated or set aside.

### VIII.

That a copy of said policy hereinabove referred to is hereunto attached hereby referred to marked Exhibit "A" and made a part hereof, and said defendant alleges that it had no other or different or other policy or agreement with the said plaintiff than as is shown and set out in said Exhibit "A." That among other things said policy shown by Exhibit "A" provides as follows:

"The Maryland Casualty Company, herein called Company, hereby agrees to indemnify the Orchard Land & Timber Company of Cottage Grove, Lane County, State of Oregon, herein called Assured, against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death, resulting therefrom, accidentally suffered by any employee of the Assured"

and this defendant alleges that said plaintiff has not sustained any loss for any liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by any employee of the Assured, or by the said O. W. Dunn referred to in said plaintiff's amended complaint, and said defendant alleges that said plaintiff did not, on or about the 11th day of November, 1914, or at any other time, pay the judgment referred to in said plaintiff's amended complaint, and in Paragraph VIII thereof.



WHEREFORE, having fully answered said plaintiff's amended complaint, this defendant prays that it go hence without day, and that said plaintiff's amended complaint and cause of action attempted to be set up herein be dismissed, and for its costs and disbursements herein.

WILBUR, SPENCER & BECKETT,  
Attorneys for Defendant.

M. E. Form No. 1.

*W. A.*

## MARYLAND CASUALTY COMPANY

Home Office—Baltimore

### Application for Manufacturers' Employers Policy

H. O. No.....	Risk begins June 5, 1912	Policy No. A 34208.
Ren. H. O. No...	Termination, June 5, 1913.	Renewal of A.
D. R. Folio.....	Liability Limits:	Pay Roll, \$7000.
A. L. Folio.....	One Person, \$5000.00	Rate, \$2.00.
	One Accident, \$10,000.00.	Premium, \$140.00.

1. Name of Assured: The Orchard Land and Timber Co.

2. Address of Assured: Cottage Grove, Oregon.

3. Compensation for last year for all employes was \$.....

4. Are there any elevators on the premises? None.

5. Are there any stamping presses? No.

If so, how many?.....Of what nature and for what purpose?.....

6. Are there any explosives used? No. Is so, what?.....

7. Has any company ever cancelled or refused to issue Liability, Elevator, Fly-Wheel or Boiler Insurance on this risk? No.

If so, when? . . . . What company? . . . . Why? . . . .

8. What company has insured this risk during the past year? Employers'.

9. The minimum premium under this Policy is \$25.00.

10. Rate of brokerage paid on this risk is . . . . . %

Approved at H. O. . . . .

We (I) hereby certify that in our (my) best judgment the applicant for this insurance is entirely responsible, that the moral hazard is the best, and recommend the risk

Rogers, Hart Gibson Co., General Agent.

Dated at Portland, Oregon, June 5, 1912.

Broker or Sub-Agent . . . . .

(OVER)

## SCHEDULE.

Kind or Kinds of Work Covered by Policy.	Place or Places Where Such Work Is to Be Done.	Estimated Compensation for Such Work for Period of Policy.	Rate on Which Initial Premium is Based and on Which Final Premium Will Be Adjusted.	Initial Premium.
Sawmill including all employees whose duties require their presence in mill and yard.	Near Divide, Lane County, Oregon.	\$7000.00	\$2.00	\$140.00

The estimated compensation includes that of all persons employed, (whether compensated by salary, wages, for piecework, overtime, or allowances, and whether paid in cash in whole or in part, in board, store certificates, merchandise, credits, or any other substitute for cash,) except that of the Assured himself, if an individual; any member of the firm, if the Assured be a firm; the President, Vice-President, Secretary and Treasurer, if the Assured be a corporation. Drivers and drivers' helpers, if they are covered by a concurrent Teams Insurance Policy with this Company, are also excluded.

Lia. Form No. 100

ENDORSEMENT.

Dated June 5, 1912.

It is hereby understood and agreed, unless specifically endorsed hereon, that this Policy does not cover any accident occurring in or upon any elevator or hoist, or in any elevator well or hoistway, or while entering or leaving any elevator or hoist owned or operated by assured.

Subject otherwise to all the terms of the Policy.

Attached to and forming part of Manufacturers Employers Policy No. A 34208 issued by the Maryland Casualty Company, of Baltimore, Md., to The Orchard Land & Timber Co., of Cottage Grove, State of Oregon.

Not valid until countersigned by

JNO. T. STONE,

President.

.....

General Agent.

Misc. Form I. 20m.

ENDORSEMENT.

Dated June 5, 1912.

It is understood and agreed that lines 16 & 17 of the within Policy are amended by striking out the words "except that the assured may provide at the time of the accident, at the expense of the Company such immediate surgical relief as is imperative."

Attached to and forming part of Manufacturers' Employers Policy No. A 34208 issued by the Maryland



Casualty Company, of Baltimore, Md., to The Orchard Land & Timber Co., of Cottage Grove, State of Oregon.

Not valid until countersigned by

JNO. T. STONE,

President.

.....

General Agent.

In consideration of ..... Dollars (\$.....) initial premium, which is based on the estimated compensation set forth in the Schedule below, and which premium is calculated at the rate or rates per \$100, of said compensation, named in the Schedule below, and is to be adjusted as stated below, at the same rate or rates, after the termination of this Policy, on the actual compensation earned during the policy period, the Maryland Casualty Company, of Baltimore, herein called the Company, hereby agrees to indemnify ....., of ....., County of ....., State of ....., herein called the Assured, against loss from the liability imposed by law upon the Assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employe of the Assured while upon the premises or upon the sidewalks or other ways immediately adjacent thereto, provided for the use of the employes or the public, occupied by the Assured in the conduct of the business and at the places mentioned in the Schedule below; provided such bodily injuries or death are suffered as a result of accidents occurring within the period of .....months, beginning on the ..... day of .....191..., at noon, and ending on the ..... day of .....191..., at noon, Standard Time, at the place where this policy has been countersigned.

The Company's liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to one person is limited to .....Dollars (\$.....), and, subject to the same limit for each person, the Company's total liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to more than one person is limited to .....Dollars (\$.....).

In addition to these limits the Company will, at its own costs (court costs, and all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability as herein before expressed, being considered part thereof) investigate all accidents and defend all suits even if groundless, of which notices are given to it as hereinafter required, unless the Company shall elect to settle the claim or suit.

This Policy does not cover any accident to, or caused by, any child employed by the Assured contrary to law, or any child employed under fourteen (14) years of age where no statute restricts the age of employment. Additions to, or alterations in, or the construction of, any building, or structure, or plant are not covered under this Policy; nor is the wrecking or demolition of any building, or structure, or plant or any part thereof; but ordinary repairs when made by the regular employes of the Assured are covered.

Immediate written notice of any accident and of any suit resulting therefrom, with every summons or other process, must be forwarded to the Home Office of the Company, or to its authorized representative.

The company is not responsible for any settlements made, or any expenses incurred by the Assured, unless such settlements or expenditures are first specifically authorized in writing by the Company; except that the Assured may provide at the time of the accident, at the expense of the Company, such immediate surgical relief as is imperative.

The estimated compensation includes, and the adjustment of the same will include, all compensation of every kind earned by all officials and employes, except the following persons: the Assured himself, if an individual; any member of the firm, if the Assured be a firm; the President, Vice-President, Secretary and Treasurer, if the Assured be a corporation.

In consideration of such exclusion from the estimated compensation and adjustment of same, accidents to persons so excluded are not covered under this Policy, but accidents caused by persons so excluded are covered hereunder.

The compensation of drivers and drivers' helpers is excluded from the estimated compensation and adjustment of same if they are covered by a concurrent Teams Insurance Policy with this Company. Drivers and drivers' helpers if included in the payroll, are covered wherever they may be.

Within sixty (60) days after the termination of the policy period the Assured shall furnish the Company a statement of all compensation of every kind earned by all employes during the policy period. An authorized representative of the Company shall have the right and

opportunity to examine the books and records of the Assured as respects such compensation, if said examination be made within twelve (12) months after the termination of the Policy.

This Policy may be cancelled by either the Company or the Assured at any time by not less than five (5) days written notice to the other, stating when the cancellation shall be effective. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured, unless the Assured has retired from business, the Company shall be entitled to the earned premium, calculated at short rates in accordance with the table printed on the back of this Policy. In either case the earned premium shall be computed on the entire compensation of all employes for the full original policy period, as indicated by the actual compensation earned by all employes during the time the Policy shall have been in force. The Company's check mailed to the address of the Assured shall be sufficient tender of return premium, but no return premium shall be payable until a statement of the actual compensation earned by all employes of the Assured during the period the Policy shall have been in force shall have been furnished to the Company by the Assured.

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It is understood and agreed, unless specifically endorsed hereon, that this Policy does not cover any obligation assumed by or imposed upon the Assured by any Workmen's Compensation Law, Agreement or Plan.



United States of America,  
District of Oregon,  
State of Oregon,  
County of Multnomah,—ss.

I, S. C. Spencer, being first duly sworn, say: That I am one of Defendant's Attorneys in the above entitled suit; that I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge except as to matters therein stated upon information and belief, and as to such matters I believe the same to be true. That I make this affidavit because none of the principal officers of said defendant reside in or are within the State of Oregon.

S. C. SPENCER,

Subscribed and sworn to before me this 16th day of

July, 1915.  
(Seal)

H. B. BECKETT,  
Notary Public for Oregon.

My Notarial Commission expires April 16, 1916.

United States of America,  
District of Oregon,—ss.

Due and timely service of the within Answer and the receipt of a duly certified copy thereof, all at the city of Portland, in the District of Oregon, is hereby admitted.

CLARK, SKULASON & CLARK,  
Attorneys for Plff.

Filed July 17, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 19th day of July, 1915, there was duly filed in said court, and cause, a Reply, in words and figures as follows, to wit;

REPLY.

Comes now the plaintiff and for its reply to the further and separate answer and defense contained in the answer of the defendant, alleges:

I.

Admits all of the allegations of said further and separate answer and defense except lines 3 to 12 both inclusive, on the last page of said answer wherein the defendant in substance alleges that the plaintiff has not sustained any loss on account of the injuries suffered by the plaintiff's employe, O. W. Dunn, and wherein the defendant alleges that the plaintiff has not paid the judgment mentioned in the pleadings herein, which portion, and the whole thereof, this plaintiff denies.

WHEREFORE plaintiff prays for judgment as demanded in the complaint.

CLARK, SKULASON & CLARK,

Attorneys for Plaintiff.

District of Oregon,

County of Multnomah,—ss.

I, Alfred P. Dobson, being first duly sworn, depose and say that I am the secretary of plaintiff corporation in the above entitled cause; and that the foregoing reply is true, as I verily believe.

ALFRED P. DOBSON,

Subscribed and sworn to before me this 19th day of July, 1915.

(Seal)

ETHEL C. GRAHAM,  
Notary Public for the State of Oregon.

District of Oregon,  
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this      day of July, 1915.

S. C. SPENCER,  
Of Attorneys for Defendant.

Filed July 19, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of October, 1915, there was duly filed in said court, and cause, Findings of Fact and Conclusions of Law in words and figures as follows, to wit;

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause being at issue, and coming on regularly for final hearing and determination before the Court without a jury, (trial by jury being waived by written stipulation signed by the parties through their respective attorneys, and filed), on the 11th day of October, 1915, and was tried upon that day, upon the pleadings, proofs and arguments of the respective parties.

Charles A. Hardy, and Clark, Skulason & Clark, appeared as Attorneys for the plaintiff, and Wilbur,

Spencer and Beckett, appeared as Attorneys for the defendant.

At the conclusion of said trial, the Court not then being fully advised in the premises, took said cause under advisement, and upon the 18th day of October, 1915, being then fully advised in the premises, the Court did render its decision in said cause in favor of the plaintiff and against the defendant for the relief prayed for in the complaint.

And the Court now finds that by reason of all the matters and things set forth in the complaint, the plaintiff, Orchard Land & Timber Company, suffered and sustained damages in the sum of \$5,000.00, together with interest thereon at the rate of 6% per annum from December 14, 1914, the date of the filing of the complaint herein, to this date, amounting to \$246.50.

And as a conclusion of law, the Court finds that the plaintiff, Orchard Land & Timber Company, is entitled to judgment against the defendant Maryland *Casualty* Company of Baltimore, for the sum of \$5,246.50 besides the costs and disbursements of this action.

Let judgment be entered accordingly.

Dated this 18th day of October, 1915.

R. S. BEAN,  
Judge.

Filed October 18, 1915. G. H. Marsh, Clerk.



And afterwards, to wit, on Monday, the 18th day of October, 1915, the same being the 91st judicial day of the regular July, 1915, term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

### JUDGMENT.

Based upon the Findings of Fact and Conclusions of Law filed and entered herein and on motion of Mr. B. G. Skulason of counsel for the plaintiff, in the above entitled cause, for judgment in accordance with the said findings,

IT IS CONSIDERED that said plaintiff do have and recover of and from said defendant, the Maryland Casualty Company of Baltimore, the sum of \$5246.50, together with its costs and disbursements herein taxed at \$20.40, and that it have execution therefor.

And afterwards, to wit, on the 19th day of October, 1915, there was duly filed in said court, and cause, a Stipulation waiving trial by jury, in words and figures as follows, to wit;

### STIPULATION WAIVING TRIAL BY JURY.

It is stipulated and agreed by and between the parties hereto, by their respective attorneys, that a trial by jury of the above entitled cause is hereby waived, and the cause may be tried to the Court without the intervention of a jury.

Dated this 11th day of October, 1915.

CLARK, SKULASON & CLARK,

Attorneys for Plaintiff.

WILBUR, SPENCER & BECKETT,

Attorneys for Defendant.

Filed October 19, 1915, G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 21st day of October, 1915, the same being the 94th judicial day of the regular July, 1915, term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER EXTENDING TIME TO FILE MOTION FOR NEW TRIAL AND BILL OF EXCEPTIONS AND STAYING-EXECUTION.

Upon motion of the defendant,

IT IS HEREBY ORDERED that the defendant have to and including the 15th day of November, 1915, within which to prepare and file its motion for a new trial, and within which to prepare and file its Bill of Exceptions herein, and

IT IS FURTHER ORDERED that during said time that execution be stayed upon the judgment in the above entitled action.

And afterwards, to wit, on the 13th day of November, 1915, there was duly filed in said court, and cause, a Motion for New Trial, in words and figures as follows, to wit;

### MOTION FOR NEW TRIAL.

The defendant moves the Court for an order to set aside the judgment heretofore entered in the above entitled action, and for a new trial, upon the ground and for the reason:

#### I.

Insufficiency of the evidence upon the trial to justify the findings of the Court, and the judgment entered thereupon.

#### II.

That the Findings, Conclusions of Law and Judgment are against the law.

WILBUR, SPENCER & BECKETT,

Attorneys for Defendant.

United States of America,  
District of Oregon,—ss.

Due and timely service of the within Motion for a New Trial and the receipt of a duly certified copy thereof, all at the city of Portland in the District of Oregon, is hereby admitted.

CLARK, SKULASON & CLARK,

Attorney for Plaintiff.

Filed November 13, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 13th day of November, 1915, the same being the 12th judicial day of the regular November, 1915, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**ORDER EXTENDING TIME TO FILE BILL  
OF EXCEPTIONS AND STAYING EX-  
ECUTION.**

Upon motion of the defendant

**IT IS HEREBY ORDERED** that the defendant have to and including December 1st, 1915, within which to prepare and file its Bill of Exceptions herein, and

**IT IS FURTHER ORDERED** that during said time that execution be stayed upon the judgment in the above entitled action.

Dated at Portland, Oregon, this 13th day of November, 1915.

**CHAS. E. WOLVERTON,**

Judge.

Filed November 13, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 29th day of November, 1915, the same being the 24th judicial day of the regular November, 1915, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:



**ORDER EXTENDING TIME TO FILE BILL  
OF EXCEPTIONS AND STAYING EX-  
ECUTION.**

Upon motion of the defendant,

**IT IS HEREBY ORDERED** that the defendant have to and including January 15th, 1916, within which to prepare and file its Bill of Exceptions herein, and

**IT IS FURTHER ORDERED** that during said time that execution, be stayed upon the judgment in the above entitled action.

Dated at Portland, Oregon, this 29th day of November, 1915.

**CHAS. E. WOLVERTON,**  
Judge.

Filed November 29, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 14th day of January, 1916, the same being the 65th judicial day of the regular November, 1915, term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**ORDER EXTENDING TIME TO FILE BILL  
OF EXCEPTIONS AND STAYING EX-  
ECUTION.**

Based upon the stipulation heretofore entered into by and between the parties to the above entitled action, through their respective attorneys:

IT IS HEREBY ORDERED that the defendant have twenty (20) days additional time within which to prepare and file its Bill of Exceptions herein, and

IT IS FURTHER ORDERED that during said time that execution be stayed upon the judgment in the above entitled action.

Dated at Portland, Oregon, this 14th day of January, 1916.

R. S. BEAN,  
Judge.

Filed January 14, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 17th day of January, 1916, the same being the 67th judicial day of the regular November, 1916 term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

### ORDER DENYING MOTION FOR NEW TRIAL.

This cause was submitted to the Court upon written briefs on the motion of the defendant to set aside the judgment and for a new trial herein, said plaintiff appearing by Mr. B. G. Skulason, of counsel, and the defendant by Mr. T. C. Howell, of counsel: On consideration whereof, IT IS ORDERED AND ADJUDGED that said motion be, and the same hereby is, denied.

And afterwards, to wit, on the 26th day of January, 1916, there was duly filed in said court, and cause, a Petition for Writ of Error, in words and figures as follows, to wit;

### PETITION FOR WRIT OF ERROR.

The Maryland Casualty Company, defendant herein, says:

That on the 18th day of October, 1915, this Court entered judgment herein in favor of the plaintiff and against the defendant for the sum of FIVE THOUSAND TWO HUNDRED AND FORTY-SIX and 50-100 (\$5246.50) DOLLARS, and costs and disbursements in said action taxed at \$20.40, in which judgment, and the proceedings had prior and subsequent thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in its behalf to the United States Circuit Court of Appeals for the 9th Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to said Circuit Court of Appeals.

WILBUR, SPENCER & BECKETT,

Attorneys for Defendant.

United States of America,  
District of Oregon,—ss.

Due and timely service of the within Petition for Writ of Error and the receipt of a duly certified copy thereof, all at the city of Portland, in the District of Oregon, is hereby admitted.

CLARK, SKULASON & CLARK,

Attorney for Plaintiff.

Filed January 26, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 26th day of January, 1915, there was duly filed in said court, and cause, an Assignment of Errors, in words and figures as follows, to wit;

### ASSIGNMENT OF ERRORS.

The defendant, above named, and in connection with its petition for writ of error in the above entitled action, suggests that there was error on the part of the Circuit Court of the United States for the District of Oregon, in regard to the matters and things hereinafter set forth, and defendant makes this its assignment of errors.

#### I.

The Court erred in signing and causing to be filed what is termed Findings of Fact and Conclusions of Law without any notice to this defendant.

#### II.

The Court erred in not making Findings of Fact and Conclusions of Law in this cause covering the issues presented by the pleadings in this action.



## III.

The Court erred in making the so-called Findings of Fact because there was no evidence and not sufficient evidence to justify and support the said socalled Findings of Fact.

## IV.

The Court erred in signing the Conclusion of Law that it did in this cause because the evidence and findings were not sufficient to justify or support or authorize the same.

## V.

The Court erred in entering judgment in this matter in favor of the plaintiff and against the defendant because there was no evidence to justify the same.

## VI.

The Court erred upon the trial of this cause in rendering judgment against said defendant and in favor of said plaintiff for any sum whatever.

## VII.

The Court erred in not granting defendant a new trial in this action, which is as follows:

“The Defendant moves the Court for an order to set aside the judgment heretofore entered in the above entitled action, and for a new trial, upon the ground and for the reason:

I.

Insufficiency of the evidence upon the trial to justify the Findings of the Court, and the judgment entered thereupon.

II.

That the Findings, Conclusions of Law and Judgment are against the law."

WHEREFORE, the said plaintiff, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Oregon, in the above entitled cause be reversed and such directions be given that full force and efficiency may inure to defendant by reason of the facts set out in its answer filed in this cause.

WILBUR, SPENCER & BECKETT,

Attorneys for Defendant.

United States of America,  
District of Oregon,—ss.

Due and timely service of the within Assignment of Errors and the receipt of a duly certified copy thereof, all at the city of Portland in the District of Oregon, is hereby admitted.

CLARK, SKULASON & CLARK,

Attorney for Plaintiff.

Filed January 26, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Wednesday, the 26th day of January, 1916, the same being the 75th judicial day of

the regular November, 1915, term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**ORDER ALLOWING WRIT OF ERROR AND  
FIXING SUPERSEDEAS BOND.**

On this 26th day of January, 1916, the above named defendant, by Wilbur, Spencer & Beckett its attorneys, filed herein and presented to the Court its petition praying for the allowance of a Writ of Error intended to be urged by defendant, praying also that the transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 18th day of October, 1915, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Judicial Circuit, presenting therewith its Assignment of Errors, and also praying that an order be made fixing the amount of the supersedeas bond, and for such other and further proceedings as may appear proper in the premises.

On consideration whereof the Court DOES HEREBY ALLOW the Writ of Error and fixes the amount of said supersedeas bond at \$7500.00.

Dated at Portland, Oregon, January 26, 1916.

R. S. BEAN,  
Judge.

Filed January 26th, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 26th day of January, 1916, there was duly filed in said court, and cause, a supersedeas bond, in words and figures as follows, to wit;

### SUPERSEDEAS BOND.

#### KNOW ALL MEN BY THESE PRESENTS:

That we, the defendant above named, MARYLAND CASUALTY COMPANY of Baltimore, Maryland, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, as Principal, and the OREGON SURETY & CASUALTY COMPANY, of Portland, Oregon, a corporation organized and existing under and by virtue of the laws of the State of Oregon, as Surety, are held and firmly bound unto the above named plaintiff, ORCHARD LAND & TIMBER COMPANY, an Oregon corporation, in the sum of SEVEN THOUSAND FIVE HUNDRED (\$7,500) DOLLARS for the payment whereof well and truly to be made until the said plaintiff above named said Maryland Casualty Company and said Oregon Surety & Casualty Company bind themselves, their successors and assigns jointly and severally by these presents.

WHEREAS, lately, at a term of the Circuit Court of the United States, for the district of Oregon, in an action pending in said Court between Orchard Land & Timber Co. as plaintiff and the Maryland Casualty Company, as defendant, a judgment was rendered against said defendant and in favor of said plaintiff, and the said defendant having obtained a writ of error, and filed a copy thereof in the clerk's office of said Court, to



reverse the judgment in the aforesaid action, and a Citation directed to the said plaintiff and admonishing it to be and appear at the next session of the United States Circuit Court of Appeals, for the Ninth Circuit.

NOW, THEREFORE, the condition of the above obligation is such that if the defendant, the MARYLAND CASUALTY COMPANY, shall prosecute said Writ of Error to effect and answer all damages and costs, if it fails to make good its plea, that the above obligation is void; otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said MARYLAND CASUALTY COMPANY, a corporation, and the said OREGON SURETY & CASUALTY COMPANY, a corporation, have caused these presents to be executed this 27th day of January, 1916.

MARYLAND CASUALTY COMPANY,  
Principal.

By Wilbur, Spencer & Beckett, Its Attorneys.

OREGON SURETY & CASUALTY COMPANY,  
Surety.

By R. W. Wilbur, Vice-President.

WILBUR, SPENCER & BECKETT,  
Counsel.

DOOLEY & CO.  
General Agents.

Examined and approved this 28th day of January,  
1916.

R. S. BEAN,  
Judge.

United States of America,  
District of Oregon,—ss.

Due service of the within bond and the receipt of a duly certified copy thereof, all at the city of Portland, in the District of Oregon, is hereby admitted.

Jan. 28, 1916.

CLARK, SKULASON & CLARK,  
Attorney for Plaintiff.

Filed January 28, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 3rd day of February, 1916, there was duly filed in said court, and cause, a Bill of Exceptions, in words and figures as follows, to wit;

### BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 11th day of October, 1915, the above entitled action came on regularly for trial in the above entitled court, before the Honorable R. S. Bean, District Judge; a jury having been waived by stipulation of the parties to the above entitled action, the plaintiff appearing by its attorneys, Chas. A. Hardy and Clark, Skulason & Clark, the defendant appearing his its attorneys, Wilbur, Spencer & Beckett.

After the opening statements of the respective counsel, certain evidence was taken, and "Exhibits A and B" were introduced in evidence. A full, complete and correct transcript of said evidence and said exhibits are hereto attached, hereby referred to, marked "Exhibit X,"

and included in and made a part of this Bill of Exceptions.

After the evidence was all introduced, arguments of counsel was heard for both parties, and the Judge not being fully advised in the premises took said case under advisement, and thereafter and on the 18th day of October, 1915, rendered an oral opinion in words and figures as follows:

Portland, Oregon, October 18, 1915.

“R. S. Bean, District Judge:

((ORAL))

The case of the Orchard Land & Timber Co. vs. the Maryland Casualty Company of Baltimore is an action to recover on an indemnity policy, by the terms of which the insurance company agreed to indemnify the plaintiff against loss or damage on account of injury to its employes. An employe was injured, sued the company, recovered a judgment and subsequently the plaintiff satisfied this judgment by giving its note to the injured party, and satisfied the judgment of record, and the question presented on this trial is whether this note and the satisfaction of the judgment amount to a payment within the meaning of the policy and entitle the plaintiff to recover, or whether it is necessary that it should pay the judgment in coin before it is entitled to recover in this action.

Now the authorities, as far as I have been able to examine them, indicate that where a note, as in this case,

was given and received in payment of the judgment that it amounts to a payment within the meaning of the policy and entitles the plaintiff to recover, and such will be the finding in this case.”

Thereafter, and on the 18th day of October, 1915, there was prepared by the attorneys for the plaintiff and presented to the Judge, without any notice to the attorneys for the defendant, the following Findings of Fact and Conclusions of Law and Judgment, which were signed by the said Trial Judge, to wit:

“This cause being at issue, and coming on regularly for final hearing and determination before the Court without a jury, (trial by jury being waived by written stipulation signed by the parties through their respective attorneys, and filed), on the 11th day of October, 1915, and was tried upon that day, upon the pleadings, proofs and arguments of the respective parties.

Charles A. Hardy, and Clark, Skulason & Clark, appeared as Attorneys for the plaintiff, and Wilbur, Spencer & Beckett, appeared as Attorneys for the defendant.

At the conclusion of said trial, the Court not then being fully advised in the premises, took said cause under advisement, and upon the 18th day of October, 1915, being then fully advised in the premises, the Court did render its decision in said cause in favor of the plaintiff and against the defendant for the relief prayed for in the complaint.

And the Court now finds that by reason of all the matters and things set forth in the complaint, the plain-



tiff, Orchard Land & Timber Company, suffered and sustained damages in the sum of \$5,000.00 together with interest thereon at the rate of six per cent. (6%) per annum from December 14th, 1914, the date of the filing of the complaint herein to this date amounting to \$246.50.

And as a conclusion of law, the court finds that the plaintiff, Orchard Land & Timber Company, is entitled to judgment against the defendant, Maryland Casualty Company of Baltimore, for the sum of \$5246.50 besides the costs and disbursements of this action.

Let judgment be entered accordingly.

Dated this 18th day of October, 1915."

### JUDGMENT.

"This cause being at issue, and coming on regularly for trial hearing and determination, before the Court without a jury, (trial by jury being waived by written stipulation signed by the parties through their respective counsel, and filed), on the 11th day of October, 1915, and was tried on that day, upon the pleadings, proofs and arguments of the respective parties.

Charles A. Hardy, and Clark, Skulason & Clark, appeared as Attorneys for the plaintiff, and Wilbur, Spencer & Beckett, appeared as Attorneys for the defendant.

At the conclusion of said trial, the Court not then being fully advised in the premises, took said cause under advisement, and upon the 18th day of October, 1915, being then fully advised in the premises, the Court did render its decision in said cause in favor of the plaintiff,

Orchard Land & Timber Company, and against the defendant, Maryland Casualty Company of Baltimore, for the relief prayed for in the complaint:

NOW, THEREFORE, It is CONSIDERED, ORDERED AND ADJUDGED, that the plaintiff, Orchard Land & Timber Company, have and recover of and from the defendant, Maryland Casualty Company of Baltimore, the sum of \$5,246.50, and its costs and disbursements in this action, taxed and allowed at \$20.40, and that execution issue therefor.

Dated this 18th day of October, 1915."

That thereafter, and on the 13th day of November, 1915, the defendant prepared and served upon the attorneys for the plaintiff and caused to be filed a motion to set aside said judgment and for a new trial, in words and figures, as follows:

"The defendant moves the court for an order to set aside the judgment heretofore entered in the above entitled action, and for a new trial, upon the ground and for the reason:

### I.

Insufficiency of the evidence upon the trial to justify the findings of the Court, and the judgment entered thereupon.

### II.

That the Findings, Conclusions of Law and Judgment are against the law."

That thereafter, and on the 10th day of January, 1916, the defendant's motion to set aside the judgment

and for a new trial came on regularly to be heard, and the same was denied.

IT IS HEREBY CERTIFIED that "Exhibit X" heretofore referred to and made a part of this Bill of Exceptions contains a complete and accurate transcript of all the evidence and proceedings had upon said trial, and that said plaintiff's "Exhibit A" is the note referred to in the said testimony, given by the said Orchard Land & Timber Co., to O. W. Dunn in the sum of \$7602.60, and that said plaintiff's "Exhibit B" is the certified copy of the records of the Circuit Court Judgment Docket Lane County, State of Oregon, showing the satisfaction of the judgment in the case of O. W. Dunn vs. Orchard Land & Timber Company, which said exhibits are hereby referred to and identified and made a part of this bill of exceptions contains all of the evidence, exhibits and proceedings of every nature had upon said trial.

NOW, I, R. S. BEAN, District Judge in the United States District Court for the District of Oregon, and the Judge before whom the above entitled action was tried, being willing that a record shall be made and presented in order that the rulings and proceedings had upon said trial as aforesaid may be reviewed for error, if any there be, HEREBY CERTIFY that the foregoing Bill of Exceptions was duly served upon the plaintiff and presented to the court for allowance in the time and manner required by law and the rulings and order of this Court, and I FURTHER CERTIFY that this Bill of Exceptions, together with the transcript of all the evidence had upon said trial, and the said plaintiff's Exhibits A and B hereby referred to and made a part hereof

contains all and the whole of the record of the proceedings had upon said trial, and that said Findings of Fact and said Conclusions of Law and said motion to set aside the judgment and for a new trial, hereinabove set out, contains all the proceedings had in this case since the trial thereof.

**WHEREFORE**, the foregoing Bill of Exceptions having been duly examined by me, and found to conform to the evidence is hereby on this 3rd day of February, 1916, duly settled, certified, signed and allowed and made a part of the record of the proceedings on appeal in this case.

Affidavit and counter affidavit relative to the service of copies of the findings and judgment are hereto attached.

**R. S. BEAN,**  
Judge.

**THIS CERTIFIES** that the foregoing Bill of Exceptions was duly presented this 28th day of January, 1916.

**G. H. MARSH,**  
Clerk of the U. S. District Court for the District of Oregon.



*In the District Court of the United States for the  
District of Oregon.*

Orchard Land & Timber Company, a corporation.

*Plaintiff.*

vs.

Maryland Casualty Company of Baltimore,

*Defendant.*

Charles A. Hardy and Clark, Skulason & Clark,

Attorneys for Plaintiff.

S. C. Spencer

Attorney for Defendant.

R. S. BEAN, District Judge.

Portland, Ore., Monday, October 11, 1915.

Mr. Hardy: Will you admit the execution of the note?

Mr. Spencer: If you tell me you got it, I will admit it.

Mr. Skulason: Plaintiff now offers the note described in the complaint and asks that it be marked as an exhibit.

Note marked "Plaintiff's Exhibit A."

Mr. Skulason: Plaintiff also offers certified copy of the records of the Circuit Court Judgment Docket of Lane County, Oregon, showing a satisfaction of the judgment described in the complaint, in favor of O. W. Dunne, and against the plaintiff.

Marked "Plaintiff's Exhibit B."

PLAINTIFF RESTS.

Mr. Spencer: Mr. Hardy, I would like to ask you a few questions. It will not be necessary for you to take the stand. You were the plaintiff's attorney in this case, were you not, one of them? I mean Mr. Dunne's.

Mr. Hardy: I was the attorney for O. W. Dunne in the action of O. W. Dunne vs. the Orchard Land & Timber Company.

Mr. Spencer: And you had associated with you the firm of Clark, Skulason & Clark?

Mr. Hardy: No.

Mr. Spencer: What was that?

Mr. Hardy: I handled the case of O. W. Dunne against the Orchard Land & Timber Company. Tried that case in the Circuit Court and in the Supreme Court, and when I was employed by the Orchard Land & Timber Company in this case, I associated Clark, Skulason & Clark with me.

Mr. Spencer: After you obtained the judgment against the Orchard Land & Timber Company in the case of Dunne against that company, you then became the attorney for the Orchard Land & Timber Company?

Mr. Hardy: In this action.

Mr. Spencer: In this action. You were not able to collect your judgment against the Orchard Land & Timber Company?

Mr. Hardy: I don't know.

Mr. Spencer: Did you try?

Mr. Hardy: Why I issued an execution and had a notice to garnishee served upon the Maryland Casualty Company and that proceeding was dismissed.

Mr. Spencer: Do you know anything about the

financial condition of the Orchard Land & Timber Company?

Mr. Hardy: Well, yes, and no. I know some part of their—something about their financial condition.

Mr. Spencer: Is that company doing any business now?

Mr. Hardy: I don't know.

Mr. Spencer: None that you know of?

Mr. Hardy: Not that I know of.

Mr. Spencer: It is a company in your county?

Mr. Hardy: I think incorporated in this state with principal office at Cottage Grove.

Mr. Spencer: Was it a sawmill?

Mr. Hardy: Yes, operated a sawmill.

Mr. Spencer: And when you obtained this judgmentment for your client, O. W. Dunne, against the Orchard Land & Timber Company for over \$7,000, you naturally wanted your money.

Mr. Hardy: Mr. Dunne wanted his money.

Mr. Spencer: Well you incidentally wanted your part of it?

Mr. Hardy: Yes.

Mr. Spencer: And up to this date you haven't got any of that money?

Mr. Hardy: No.

Mr. Spencer: You remember about the case where you had execution served upon the Maryland Casualty Company, don't you—that part of the case?

Mr. Hardy: Oh, yes, I attended to that.

Mr. Spencer: You do recollect, do you not, that when you started to bring the Maryland Casualty Com-

pany into court down there in your home town, down in Lane County—Eugene, isn't it?

Mr. Hardy: Yes.

Mr. Spencer: You know that part of it to reach the Liability Company on that garnishment in the case of Dunne vs. Orchard Land & Timber Company, that part was removed here to the Federal Court. You know that, don't you?

Mr. Hardy: Certainly.

Mr. Spencer: Then do you remember that after this case was started a plea in abatement was filed, stating that the Orchard Land & Timber Company had not paid its license fees to the corporation department, and asking to have the case abated. Do you remeber that proceeding?

Mr. Hardy: I was advised of that.

Mr. Spencer: Who paid up those fees?

Mr. Hardy: The Orchard Land & Timber Company procured its re-instatement, and the money was furnished for that purpose by myself.

Mr. Spencer: That is what I thought. When you took this note that has been introduced in evidence here for \$7602.60, in favor of O. W. Dunne, and signed by the Orchard Land & Timber Company—it is a ninety day note, isn't it?

Mr. Hardy: It shows on its face, yes.

Mr. Spencer: You never have collected that note, of course?

Mr. Hardy: Not yet.

Mr. Spencer: Never commenced any action to collect it?



Mr. Hardy: Not yet.

Mr. Spencer: And you don't know where you could collect, do you?

Mr. Hardy: Yes.

Mr. Spencer: From the Maryland Casualty Company?

Mr. Hardy: Well, I think that if the Orchard Land & Timber Company collects on this policy of insurance, that will be money that can be reached by the holder of this prommissory note.

Mr. Spencer: But you can't collect that note unless you can get the money from the Maryland Casualty Company on this policy?

Mr. Hardy: Not necessarily; there are two other possibilites of collecting.

Mr. Spencer: But you have made no effort to get this money out of any other asset of the Orchard Land & Timber Company, except that which you call an asset as against the Maryland Company?

Mr. Hardy: I don't know whether that is an asset. The fact remains, as I said, there has been no action commenced on this note.

Mr. Spencer: The object in taking this note was to make a foundation to sue the Maryland Company, wasn't it?

Mr. Hardy: The object of taking the note—well, one thing was to get some security.

Mr. Spencer: Is the note any better security than the judgment you had?

Mr. Hardy: Well, the note is secured.

Mr. Spencer: How is it secured?

Mr. Hardy: Well, that is secured by an assignment from the Orchard Land & Timber Company to Dunne of any judgment that the Orchard Land & Timber Company may recover in this action.

Mr. Spencer: When you took the note, whose attorney were you then, Dunne's or the Orchard Land & Timber Company's?

Mr. Hardy: Well, I took the matter up with Mr. Brainard, president of the Orchard Land & Timber Company, in the first instance, myself, and asked him if I could act for the Orchard Land & Timber Company in this matter, and I am acting for the Orchard Land & Timber Company and Mr. Dunne; am attorney for both of them.

Mr. Spencer: Both of them?

Mr. Hardy: With the understanding on the part of both of them.

Mr. Spencer: So the whole scheme was to get this note—while you were acting for Dunne—was to get this note and then get an assignment from the Orchard Land & Timber Company of any claim it had against the Maryland Casualty Company, so if it got this money

Mr. Hardy: I can answer that question best by saying Mr. Brainard told me he took this policy of insurance up for the benefit of his employes, and he wanted the Maryland Casualty Company to meet its obligations. And then I had the idea further—no concealment about it—that the Orchard Land & Timber Company would undoubtedly use some of this money, turning it over to Mr. Dunne paying this note.

Mr. Spencer: I think that is all, your Honor.

Mr. Skulason: You may state whether or not the Orchard Land & Timber Company, at the time you took this note and entered into this arrangement satisfied this judgment out of any other assets than those claimed from the defendant in this case.

Mr. Hardy: Well, as I understand the facts, about the time this judgment was obtained against the Orchard Land & Timber Company, and possibly while the appeal was pending, Mr. Brainard, who was the chief stockholder of the Orchard Land & Timber Company, organized the Brainard Lumber Company and the Brainard Lumber Company acquired the sawmill that the Orchard Land & Timber Company had been operating at the time Dunne received these injuries out of which this action grew, and there might be some further assets in the hands of the Orchard Land & Timber Company in the way of stock subscriptions, but I am not advised as to the facts about that. I can't say. I don't know what other claims they might have against—or any claims they might have along that line.

Mr. Skulason: What was this Brainard Lumber Company you speak of? What was its connection with the plaintiff in this case?

Mr. Hardy: The Brainard Lumber Company might be said to be the successor of the Orchard Land & Timber Company in the matter of the operation of the sawmill.

Mr. Skulason: That company then, as I understand it, took over the assets of the plaintiff in this case after its liability to Dunne had accrued?

Mr. Hardy: It took the sawmill, flume, machinery,

and the sawmill was on leased land. I understand it also took the lease.

Mr. Spencer: Did the Orchard Land & Timber Company go into bankruptcy? Do you know that?

Mr. Hardy: I am satisfied they did not.

Mr. Spencer: Were you ever attorney for the Orchard Land & Timber Company in any other transactions except this?

Mr. Hardy: Well, I had some business with Mr. Brainard in various transactions. I don't know just exactly where the Orchard Land & Timber Company ends and Mr. Brainard begins. I hardly think I was acting for the company.

Portland, Oregon, Monday, October 18, 1915.

R. S. BEAN, District Judge: (ORAL)

The case of the Orchard Land & Timber Company vs. the Maryland Casualty Company of Baltimore is an action to recover on an indemnity policy, by the terms of which the Insurance Company agreed to indemnify the plaintiff against loss or damage on account of injury to its employes. An employe was injured, sued the company, recovered a judgment and subsequently the plaintiff satisfied this judgment by giving its note to the injured party, and satisfied the judgment of record, and the question presented on this trial is whether this note and the satisfaction of the judgment amount to a payment within the meaning of the policy and entitle the plaintiff to recover, or whether it is necessary that it should pay the judgment in coin before it is entitled to recover in this action.



Now the authorities, as far as I have been able to examine them, indicate that where a note, as in this case, was given and received in payment of the judgment that it amounts to a payment within the meaning of the policy and entitles the plaintiff to recover, and such will be the finding in this case.

Plaintiff's Exhibit A.

\$7602.60

Cottage Grove, Ore., Nov. 11, 1914.

Ninety days after date, without grace, . . . . promise to pay to the order of O. W. Dunn, Seventy Six Hundred two and 60-100 Dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin at the rate of . . . . per cent per annum, from date until paid, for value received. Interest to be paid—and if not so paid, the whole sum of both principlal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof . . . . promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

ORCHARD LAND & TIMBER CO.,

By C. D. Brainard, (Treas.)

By Alfred P. Dobson (Secy.)

PLAINTIFF'S EXHIBIT B.

Judgment Debtors	Judgment Creditors	Amount of Judgment	Date of Entry in Journal	When Docketed	Execution Issued	Appeal When Taken	Decision on Appeal	Satisfaction When Entered
Day	Month	Year	Day	Month	Year	Day	Month	Year
Orchard Land and Timber Company a Corporation. No. 8052 16-261	O. W. Dunn	Judgment \$7500.00 102.60	11 Nov. 1912	15 Nov. 1912	10 Jan. 1914		Reporters Fees assigned to Lane County. For notice of attorney's lien see File Book 2, Page 28.	Satisfaction in full this 16th day of Nov., 1914, except as to Reporters Fees assigned to Lane County. O. W. DUNN Attest: STACY M. RUSSELL

O. W. Dunne,

*Plaintiff,*

Against

The Orchard Land and Timber Company, a Corporation,  
tion,

*Defendants.*

*Clerk's Office, Circuit Court of the State of Oregon,  
County of Lane.*

*Plaintiff.*

Against

The Orchard Land and Timber Company, a corporation,

*Defendants.*

State of Oregon,

County of Lane,—ss.

I, Stacy M. Russell, County Clerk and Clerk of the Circuit Court of the State of Oregon, in and for Lane County, do hereby certify that I have compared the foregoing copy of judgment with the original, and that it is a correct transcript therefrom and all of the whole of such "Original Judgment" as the same appears of record in Circuit Court Judgment Docket Lane County, Oregon, No. 5, at Page 274, now in my official care and custody.

IN TESTIMONY WHEREOF I have hereunto set my hand and seal of said court this the 9th day of October, 1915.

(Seal)  
stamp

S. M. RUSSELL, Clerk.

C. D. LEE, Deputy Clerk.

*In the District Court of the United States for the  
District of Oregon.*

PROPOSED AMENDMENTS TO BILL OF  
EXCEPTIONS.

Orchard Land & Timber Company, a corporation,  
*Plaintiff.*

v.

Maryland Casualty Company, of Baltimore Maryland,  
a corporation,  
*Defendant.*

Comes now the plaintiff and proposes the following  
amendments to the Bill of Exceptions heretofore served  
upon the Attorneys for the plaintiff:

I.

That the name Charles A. Harding, wherever the  
same appears, be changed to Charles A. Hardy, the lat-  
ter being the true name of one of the Attorneys who  
appeared in the case for the plaintiff.

II.

That the following be inserted after the date of the  
judgment, at line 21, page 4 of the bill of exceptions:

“That on the 18th day of October, 1915, true and  
correct certified copies of said Findings and Judgment,  
were served by the Attorneys for plaintiff upon the At-  
torneys for the defendant, immediately after the signing  
and filing thereof, at their office in Portland, Oregon.



Said proposed amendments are based upon the files and records in said cause, and upon the affidavit of M. H. Clark, which is attached hereto.

CHAS. A. HARDY,  
CLARK, SKULASON & CLARK,  
Attorneys for Plaintiff.

*In the District Court of the United States for the  
District of Oregon.*

AFFIDAVIT.

Orchard Land & Timber Company, a corporation,  
*Plaintiff.*

v.

Maryland Casualty Company of Baltimore, Maryland,  
a corporation,  
*Defendant.*

State of Oregon,  
County of Multnomah,—ss.

I, M. H. Clark, being first duly sworn depose and say: That I am a member of the firm of CLARK, SKULASON & CLARK, and am one of the attorneys for the above named plaintiff; that on or about the 18th day of October, 1915, either the same day, or the day following the signing and entry of Findings and judgment in the above entitled cause, I delivered to the attorneys for the defendant, a copy of the Judgment and Findings; that said copy was either handed to the said Attorneys for the defendant, by me personally, or by me mailed to the said Attorneys for the defendant, on or

about the date mentioned, at their office in Portland, Oregon.

M. H. CLARK,

Subscribed and sworn to before me this 31st day of January, 1916.

(Seal)

H. G. DUNLAP,  
Notary Public for Oregon.

My Commission expires Oct. 16, 1916.

District of Oregon,  
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 31st day of January, 1916.

S. C. SPENCER,  
Of Attorneys for Defendant.

*In the District Court of the United States for the  
District of Oregon.*

OBJECTIONS TO PROPOSED AMEND-  
MENTS TO BILL OF EXCEPTIONS.

Orchard Land & Timber Company, a corporation,  
*Plaintiff.*

vs.

Maryland Casualty Company, of Baltimore, Maryland,  
a corporation,

*Defendant.*

The defendant objects to Paragraph II of plaintiff's Proposed Amendments to Bill of Exceptions and asks

the Court to insert, in lieu of what the plaintiff asked, the following:

“That several days after the 18th day of October, 1915, upon the request of the defendant, plaintiff delivered to defendant true and correct certified copies of said Findings and Judgment.”

Said objection of defendant is supported by the affidavit of S. C. Spencer which is attached hereto.

**WILBUR, SPENCER & BECKETT,**

*Attorneys for Defendant.*

*In the District Court of the United States for the  
District of Oregon.*

**AFFIDAVIT.**

Orchard Land & Timber Company, a corporation,  
*Plaintiff.*

vs.

Maryland Casualty Company, of Baltimore, Maryland,  
a corporation,

*Defendant.*

State of Oregon,  
County of Multnomah,—ss.

I, S. C. Spencer, being first duly sworn, depose and say, that at some time after the 18th day of October, 1915, I heard that the Court had signed the Findings of Fact, Conclusions of Law and the Judgment in this case and that I communicated with the clerk of said Court and ascertained that this was so and that there-

upon I telephoned to M. H. Clark, one of the attorneys for the plaintiff, and asked him to furnish me with copies of said Findings of Fact, Conclusions of Law and Judgment, which he did at my request.

(Seal) S. C. SPENCER,

Subscribed and sworn to before me this 2nd day of February, 1916.

(Seal) F. C. HOWELL,  
Notary Public for Oregon.

My Commission expires Oct. 19, 1916.

United States of America,  
District of Oregon,—ss.

Due and timely service of the within objections to proposed amendments and the receipt of a duly certified copy thereof, all at the city of Portland in the said District of Oregon, is hereby admitted.

CLARK, SKULASON & CLARK,  
Attorney for Plff.

Bill of Exceptions filed February 3, 1916.

G. H. MARSH,  
Clerk.

And afterwards, to wit, on the 3rd day of February, 1916, there was duly filed in said court, and cause, a Praecipe for Transcript of record, in words and figures as follows, to wit;



**PRAECIPE FOR TRANSCRIPT.**

To the Clerk of the above entitled Court:

Please prepare and have printed in accordance with the law and rules of the court a transcript of record upon the writ of error in the above entitled cause, and include in said transcript the following:

Amended complaint.

Answer.

Reply.

Stipulation waiving jury trial.

Findings of Fact and Conclusions of Law and Judgment.

Motion for new trial.

Order denying motion for new trial.

Various orders extending time to file Bill of Exceptions.

Bill of Exceptions.

Petition for writ of error.

Assignments of error.

Order allowing writ of error and fixing supersedeas bond.

Writ of error.

Citation on Writ of Error.

Supersedeas bond.

**WILBUR, SPENCER & BECKETT,**

Atty's for Maryland C. Co.

Filed February 3, 1916. G. H. Marsh, Clerk.

United States of America,  
District of Oregon,—ss.

I, G. H. MARSH, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on writ of error in the case in which the Orchard Land & Timber Company, a corporation, is plaintiff and defendant in error, and Maryland Casualty Company, of Baltimore, Maryland, a corporation, is defendant and plaintiff in error, in accordance with the law and rules of the court and in accordance with the praecipe of said plaintiff in error, and that the said transcript is a full, true, and correct transcript of the record of proceedings had in said court in said cause in accordance with the said praecipe as the same appears of record on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$. . . . . for clerk's fees for preparing the said transcript, and \$. . . . . for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this       day of       , 1916.

Clerk.



In the United States  
Circuit Court of Appeals  
For the Ninth Circuit

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MARYLAND CASUALTY COMPANY of 'Bal-  
timore, Maryland, a corporation,

*Plaintiff in Error.*

VS.

ORCHARD LAND AND TIMBER COMPANY,  
a corporation,

*Defendant in Error.*

---

BRIEF OF PLAINTIFF IN ERROR.

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*Upon Writ of Error to the District Court of the United  
States for the District of Oregon.*

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In the United States  
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STATEMENT OF THE CASE.

This is an action upon an employer's liability policy of indemnity insurance. The complaint alleges in substance the corporate capacity of the parties, and that on June 5, 1912, the defendant (plaintiff in error) issued to the plaintiff (defendant in error) its contract of in-



insurance wherein the defendant did contract and agree to indemnify the plaintiff against loss from the liability imposed by law upon the plaintiff for damages on account of bodily injuries, including death, resulting therefrom suffered by any employee of the plaintiff while upon the premises of the plaintiff in and about its saw mill in Lane County, Oregon. The limit of the policy for an accident to one person resulting in bodily injuries or death was \$5,000.

O. W. Dunn, an employee, was injured while working in plaintiff's saw mill while said contract of insurance was in force, and brought an action to recover damages therefor in the sum of \$15,000. Under the terms of said contract of insurance the defendant did not settle said claim or action, but assumed charge and control of the action, which resulted in a judgment against the plaintiff in the sum of \$7,500 and costs taken at \$102.60. Thereafter on behalf of the plaintiff the defendant took an appeal to the Supreme Court of the State of Oregon where the judgment was affirmed on December 9, 1913.

The complaint further alleges, "That on or about the 11th day of November, 1914, the plaintiff settled said claim and *paid* said judgment and procured a release and satisfaction thereof; that plaintiff has duly kept and performed each and every term and stipulation and condition of said contract of insurance to be by it kept and performed; that said plaintiff *settled* and *procured a discharge* of said judgment for the sum of \$7,602.60; that by reason of the aforesaid facts, plaintiff has suf-

ferred, as result of the injuries and the judgment rendered in favor of the said Dunn, in the sum of \$7,602.60; that by the terms of said contract of insurance the defendant contracted and agreed to and with the plaintiff to compensate, indemnify and reimburse the plaintiff in the sum of \$5,000 because of loss imposed upon plaintiff by the said injuries and the judgment rendered as a result thereof;

“That defendant has failed and refused to indemnify the plaintiff in the sum of \$5,000 or any part thereof; that by reason of the facts aforesaid, defendant is indebted to the plaintiff in the sum of \$5,000.”

The answer denies the allegations of payment and satisfaction of said claim and judgment for the sum of \$7,602.60 and the loss suffered by the plaintiff, and further alleges that Maryland Casualty Company by said policy of insurance agreed to indemnify the Orchard Land and Timber Company against loss from liability imposed by law for damages on account of bodily injuries, including death, resulting therefrom accidentally suffered by any employee, and that the plaintiff has not sustained any loss on account of the injuries suffered by said O. W. Dunn, and that plaintiff did not at any time pay the judgment referred to in plaintiff's complaint.

The testimony of Charles A. Hardy, attorney for plaintiff in this action, and attorney for O. W. Dunn in the state court, showed that about the time Dunn secured a judgment against the plaintiff in the state court,

Mr. Brainard, who was the chief stockholder of the plaintiff corporation, organized the Brainard Timber Company, and the property of the Orchard Land and Timber Company was transferred to the new company, and the Orchard Land and Timber Company ceased to do business. When the action in the state court was affirmed by the Supreme Court, Mr. Hardy had an execution issued and a garnishment served upon the Maryland Casualty Company, which process was removed to the federal court where a plea of abatement was filed, stating that the Orchard Land and Timber Company had not paid its license fee to the corporation department, and asked to have the case abated. Mr. Hardy advanced the money to pay the license fee of the Orchard Land and Timber Company and procured its reinstatement.

After that proceeding was dismissed an understanding between Mr. Hardy and Dunn and the Orchard Land and Timber Company was reached whereby the Orchard Land and Timber Company, on November 11, 1914, executed a 90-day promissory note to Dunn in the sum of \$7,602.60, without interest, and Dunn satisfied the judgment.

Neither Mr. Hardy nor Dunn made any attempt to collect the note, nor has it been paid.

The trial court found that by giving the promissory note, plaintiff suffered and sustained damages and a loss in the sum of \$5,000 and interest thereon from the date of filing complaint in the sum of \$246.50. Judgment was entered against the defendant for \$5,246.50

and costs taxed at \$20.40. Thereafter defendant's motion to set aside judgment and for a new trial was overruled.

## SPECIFICATIONS OF ERRORS

The following are the specifications of errors relied upon by the plaintiff in error, and which are intended to be urged by it on the writ of error as grounds of reversal of the judgment of the District Court, and (omitting No. 1) are identical with the errors suggested under the head of "Assignment of Errors" in the printed transcript of record commencing at page 35 thereof, to-wit:

### "I.

"The court erred in not making Findings of Fact and Conclusions of Law in this cause covering the issues presented by the pleadings in this action.

### II.

"The court erred in making the so-called Findings of Fact because there was no evidence and not sufficient evidence to justify and support the said so-called Findings of Fact.

### III

"The court erred in signing the Conclusion of Law that it did in this cause because the evidence and findings were not sufficient to justify or support or authorize the same.



## IV.

“The court erred in entering judgment in this matter in favor of the plaintiff and against the defendant because there was no evidence to justify the same.

## V.

“The court erred upon the trial of this cause rendering judgment against said defendant and in favor of said plaintiff for any sum whatever.

## VI.

“The court erred in not granting defendant a new trial in this action, which is as follows:

“The defendant moves the court for an order to set aside the judgment hertofore entered in the above entitled action, and for a new trial, upon the ground and for the reason:

## I.

“Insufficiency of the evidence upon the trial to justify the Findings of the Court, and the judgment entered thereupon.

## II.

“That the Findings, Conclusions of Law and Judgment are against the law.”

## ARGUMENT

The question in this case is whether the defendant in error has suffered a loss or has been damaged within

the meaning of the terms of the policy which "agrees to indemnify the Orchard Land and Timber Company against loss from liability imposed by law on account of bodily injuries, etc." suffered by an employee (Record, p. 20). This question is involved in each assignment of error urged, and to avoid repetition we will consider the assignments of error collectively.

*The policy in question is an agreement to indemnify against loss, and the employer can recover no more than he has actually suffered in damages by payment of the judgment recovered by an employee.*

In *Fidelity & Casualty Company of New York v. Martin*, 173 S. W. (Ky.) 307, a policy involving terms which are similar to the one in this case, and which agreed to indemnify the assured against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, etc., the court held that this was a policy indemnifying against loss and not against liability, and that the assured must suffer actual loss before the insurer was liable. The court says on page 310:

"By Clause R of the policy the company's liability for loss from an accident resulting either in bodily injuries to or in the death of one person is limited to \$5000, and such expenses as it may incur in defending any suit, including the interest on and verdict or judgment and any costs taxed against the assured.

"In view of the great weight of authority to that effect, it is our conclusion that the policy here involved indemnifies against loss and not against liability."

In *Campbell v. Maryland Casualty Co.*, 97 N. E. (Ind.) 1026, a similar policy was under consideration which agreed to indemnify the assured against loss from common law and statutory liability for damages on account of bodily injury to employees. The court construed this part of the policy as a contract of indemnity and says:

“If the policy sued on is a contract to indemnify against loss, it is necessary to show a damage before there can be a recovery. . . . On the other hand, if the policy sued on is a contract to protect the assured against liability merely, an action may be brought and a recovery had as soon as the liability is legally imposed, regardless of the question as to whether or not actual loss or damage has been suffered. . . . The distinction observed between contracts to indemnify against loss, and contracts to protect against liability, is recognized by practically all the cases cited.”

But there was another provision of the policy which was contained in a slip or paster attached thereto which the court held made the policy one insuring against liability.

The case of *Carter v. Aetna Life Insurance Co.*, 91 Pac. (Kans.) 178, 11 L. R. A. (N. S.) 1155, is one where the assured held a policy of indemnity insurance similar to that in this case, and while the policy was in force an employee was injured and the attorneys for the insurance company defended the action which resulted in a verdict against the assured. While the action was pending the assured was adjudicated a bankrupt and its

assets were taken over and administered. The judgment creditor sought to have the insurer pay his judgment against the assured, and the court held that the contract was one of indemnity and the assured must suffer loss before there was liability upon the policy. The court says, at page 178:

“The contract was indemnity against loss from liability, and not insurance against liability. In its general features, it provided for making good the loss suffered by the assured, or rather for reimbursing it to the extent of its loss. Until the assured had met with a loss, there was no occasion to pay indemnity; no reason to reimburse, until something had been paid by the assured.”

To similar effect is *Allen v. Aetna Life Insurance Co.*, 145 Fed. 881, 7 L. R. A. (N. S.) 958, where a judgment creditor sought to garnishee an insurance company which carried liability insurance for a judgment debtor, his employee, and the court held that the liability of the insurer was only to indemnify the assured against loss, and no valid claim existed against it until the judgment should be paid by the assured, and for that reason was not liable to the plaintiff on the judgment as garnishee.

In *Atlas Hardwood Lumber Co. v. Georgia Life Insurance Co.*, 167 S. W. (Tenn.) 109, a similar policy was construed and the court says at page 110:

“It will be observed that by the terms of the policy the insurance company agrees to indemnify the assured against loss on account of accident covered thereby, and



does not agree to indemnify the assured against liability from loss on account of such accidents.

“This distinction is well recognized in law, and has been taken by this court in two cases: *Finley v. Casualty Company*, 113 Tenn. 592, 83 S. W. 2; . . . *Cayard v. Robertson*, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224 . . .

In *Finley v. Casualty Co.*, *supra*, the authorities are reviewed at length, and this court said that under policies insuring against indemnity from loss, ‘the amount of insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy.’

“As stated above, the assured in this case has not paid the loss, and the authorities approved in *Finley v. Casualty Co.*, and upon which that case rests, held that such payment is a condition precedent to the maintenance of a suit against the indemnity company on such a policy. In other words, the cases hold that until the claim or judgment against the assured has been paid by him, he has sustained no loss, and therefore he has no claim under a policy insuring him against loss.”

In *Lowe v. Fidelity & Casualty Co.*, 87 S. E. (N. C.) 250, the court says on page 251:

“Upon the second ground of defense we are of the opinion that plaintiff is not entitled to recover \$5000. The contract does not indemnify the assured against liability but only against actual loss. It is admitted that

the judgment has not been paid; that being so plaintiff has suffered no loss and cannot recover.”

To the same effect, *Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland*, 155 N. W. (Wis.) 1085.

In *Moses v. Travelers Insurance Co.*, 49 Atl. (N. J.) 720, the policy insured against loss sustained by an employer through accidents happening to his employees, the court held that not the amount of the employee's judgment, but the amount paid by the employer thereon was the sum for which the insurer was responsible. The assured was adjudged a bankrupt, and the court held that whatever was paid upon the judgment by the trustee in bankruptcy was the amount for which the insurer was liable.

In *Fenton v. Fidelity & Casualty Co.*, 36 Or. 283, *Willamette Steam Mills, Lumber & Mfg. Co.* carried a policy of insurance written by the *Fidelity & Casualty Company*, and while the policy was in force one of the employees of the assured was injured and the plaintiff, who was a physician and surgeon, was employed by the assured to attend the injured. Shortly afterward the mill company became insolvent and the policy of insurance was assigned to the plaintiff and was accepted by him in full payment and satisfaction for his claim for services, and he thereupon brought the action to recover for said services. The court held that the term “does hereby agree to indemnify against liability for damages on account of fatal or non fatal injuries accidentally suffered by an employee” was an insurance against liability. The court says on page 288:

“There is a distinction made by the authorities between a contract of indemnity against liability for damages, and a simple contract to indemnify against damages. In the former case it has very generally been held that an action may be brought, and a recovery had, as soon as the liability is legally imposed, while in the latter there is no cause of action, until there is actual damage (citing authorities). If, therefore, the policy upon which this action is based is a mere contract of indemnity, the payment by the mill company of the liability incurred by it for the services of the plaintiff is a condition precedent to the right of recovery”

In *Scheuerman v. Mathison*, 70 Or. 40, 144 Pac. 1177, the firm of Mathison & Anderson, the defendants, carried an employer's liability policy issued by the Pacific Coast Casualty Company. Scheuerman, an employee of the defendants, was injured while the policy was in force and recovered a judgment. The defense of the action was handled by attorneys for the insurance company. After the plaintiff obtained his judgment, he caused a writ of execution to be issued upon said judgment and collected thereon the sum of \$124, and said sum was all that the defendants paid upon said judgment. Thereupon the judgment creditor sought to garnishee the Pacific Coast Casualty Company, the insurer. The policy insured against loss and expense arising from claims on account of bodily injuries or death accidentally suffered by an employee. As a further provision that no action should lie against the insurer for any loss or expense under the policy unless it shall be brought for loss or expense actually sustained and paid

in satisfaction of a final judgment within ninety days from the date of said judgment and after trial of the issue. The court held that the contract insured against actual loss, and for that reason the insurance company was only liable for what the assured actually paid upon the judgment, which was the sum of \$124. The court says on page 56:

“The right to recover from a casualty company is limited to the amount of loss or expense actually sustained and paid in the satisfaction of a final judgment obtained by the injured employee against the company. The obtaining of a final judgment against the assured by the injured employee and the payment of that judgment in whole or in part are conditions precedent to the right of the assured to maintain an action against the casualty company on such policy, and until the assured has a right of action against the company, an injured employee, who has obtained a final judgment against the assured, has no right to garnish the company. Until the assured has paid the injured employee his judgment, or a part thereof, the company does not owe the assured anything and there is nothing in his hands to attach or garnish.”

There can be no question about the meaning of the terms of this policy. That it is a policy of indemnity insurance is recognized by the plaintiff. The action is brought upon that theory, for in the complaint it is alleged:

“That on or about the 11th day of November, 1914, the plaintiff settled said claim, and paid said judgment, and procured a release and satisfaction thereof. That



plaintiff has duly kept and performed each and every term, stipulation and condition of said contract of insurance, to be by it kept and performed. That said plaintiff settled and procured a discharge of said judgment for the sum of \$7602.60; that by reason of the aforesaid facts, plaintiff has suffered as a result of the injuries and the judgment rendered in favor of the said Dunn, in the sum of \$7602.60. That by the terms of said contract of insurance, the defendant contracted and agreed to and with the plaintiff, to compensate, indemnify and reimburse the plaintiff in the sum of \$5000.00, because of loss imposed upon plaintiff by the said injuries, and the judgment rendered as a result thereof. That defendant has failed, neglected and refused to indemnify the plaintiff in said sum of \$5000.00, or any part thereof.” (Record, pp. 8, 9.)

Has the plaintiff proved these allegations? Has it paid the judgment for the sum of \$7602.60 as alleged? The evidence shows that plaintiff executed a ninety-day promissory note without interest for the amount of the judgment, and the judgment creditor satisfied the judgment, the note and a certified copy of the judgment docket of the circuit court of Lane County, Oregon, were introduced in evidence (see Record, pp. 48, 56-57), and no explanation whatever was offered by the plaintiff concerning the transaction.

*Payment of the judgment by the plaintiff is a condition precedent, and it must prove payment as alleged. It must aver and prove full performance.*

Or. 427, an action was brought upon the policy of life insurance. A promissory note had been given in payment of the premium. The policy required the premium to be paid before it went into effect. The plaintiff alleged that the policy was issued and that the premium had been paid, and that the insured had performed all the agreements and conditions of the policy on his part. The court says on page 436:

“By its terms it is based upon the payment of \$27.95 on September 1, 1910, which payment consequently is a condition precedent to the requiring of any disbursement on the part of the defendant. As said by Mr. Justice Bean in *Faber v. Hougham*, 36 Or. 428, (59 Pac. 547): ‘It is familiar law that, if an action be brought on the covenants of an executory contract, it is necessary as a general rule for the plaintiff to aver and prove full performance on his part. . . . These questions are learnedly discussed by Mr. Clark in his excellent work on *Contracts*, and as applicable to the case at hand we take the rule to be as stated by him: ‘When it appears that one of two covenants or promises is to be performed at an earlier date than the other, the rule is simple and uniform, namely, that the covenant or promise that is to be performed first is independent and absolute, while the one that is to be performed last is dependent upon the performance of the former being a condition precedent to the performance of the latter.’

“If, therefore, nothing else is shown it is incumbent upon the plaintiff to show performance of the condition of payment of the premium, and with that principle in

view she has alleged: 'That up to the time of the death of the said Walter A. Cranston all premiums which accrued on said policy were paid at the time they accrued, and that in all other respects said Walter A. Cranston duly performed all the agreements and conditions of said policy on his part' Having therefore alleged payment or performance, the plaintiff must prove the same when the allegation is traversed or she cannot prevail."

So it is contended that since the plaintiff has alleged payment of said judgment for said sum of \$7602.60, it must prove that it actually paid that sum for the satisfaction of the judgment.

Mr. Justice Burnett, in the Cranston case, *supra*, defines payment as follows:

"Payment is the discharge of an obligation by the delivery and acceptance of money or of something equivalent to money which is regarded as such at the time by the party to whom the payment is due.

"Said Mr. Chief Justice Lord in *Bush v. Abraham*, 25 Or. 336, 35 Pac. 1066: 'Payment, in a restricted sense, is a discharge in money of a sum due. As usually understood, it means the transfer of money from one person, who is the payor, to another, who is the payee, in satisfaction of a debt. In such sense, it would not include an exchange or compromise, or an accord and satisfaction, but would mean the full satisfaction of a debt in money. But, in its general sense, payment is the performance of an agreement, or the fulfillment of a promise or obligation, whether it consists in giving or doing. The dis-

charge of a contract or obligation in money or its equivalent, with the assent of the parties, would constitute payment. It may be made in something else than money; in fact, anything that the creditor will accept as payment. It is a mode of extinguishing obligations. To constitute payment, therefore, money, or some other valuable thing, must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor receive it for the same purpose."

"Other definitions are as follows:

"A payment is defined to be the performance of an obligation for the delivery of money.

"Payment is defined to be the act of paying; the delivery of money in the course of business.

"Payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation or duty; satisfaction of a claim; recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due.

"In legal contemplation payment is the discharge of an obligation by the delivery of money or its equivalent, and is generally made with the assent of both parties to the contract." 6 Words and Phrases 5247, and authorities there cited"

*Accepting a promissory note is not to be considered as taken in discharge of a debt unless it is at the time so agreed and understood. There must be an indubitable agreement that the debtor must look solely to the note for the payment.*



In *Leschen & Sons Rope Co. v. Mayflower, Etc., Co.*, 173 Fed. 855, 35 L. R. A. (N. S.) 1, the court in considering the question of a promissory note as payment of a debt, says on page 857:

“The acceptance by a creditor of the promissory note of his debtor for his antecedent debt does not distinguish it, unless the note is paid. It is not an absolute, but a conditional, payment of the debt (citing authorities). A clear agreement by the creditor that he will take the risk of the payment of the note and that the debt is discharged thereby, or the indubitable intention of both parties to that effect, is requisite to extinguish the debt by the taking of the debtor’s note. An agreement that a debt shall be paid, or shall be payable, or that it has been paid by the note of the debtor, is a contract for an extension of the time of payment, and that the debt shall be paid, or that it has been paid, by the note of the debtor on condition that the note is paid, but not otherwise.”

In *Cranston v. West Coast Life Ins. Co.*, *supra*, 63 Or. 438, the court says:

“In *Stringham v. Mutual Insurance Co.*, 44 Or. 447, 459, (75 Pac. 822), Mr. Justice Wolverton says: ‘It has been firmly settled by this court that the acceptance of a note is not to be considered as taken in discharge or payment of the debt unless it is at the time so agreed and understood <sup>1</sup>(citing authorities).’ ”

To the same effect are *Clarke-Woodard D. Co. v. Hot Lake S. Co.*, 75 Or. 235, 146 Pac. 135; *Seaman v.*

Muir, 72 Or. 583, 44 Pac. 121; Matlock v. Scheuerman, 51 Or. 49, 93 Pac. 832, 17 L. R. A. (N. S.) 747.

Therefore it is contended that since there is no agreement or testimony that the judgment creditor accepted this note in payment of said judgment, the payment of the same has not been made.

A convincing circumstance showing that the note was not intended as payment of the judgment is the testimony of Mr. Hardy, attorney for Dunn in the state court, and attorney for plaintiff in the action at bar. Mr. Hardy's testimony shows conclusively that the whole transaction of giving the note and satisfying the judgment is a fabrication and lacks every element of good faith.

The fact that Mr. Hardy testified that the Orchard Land and Timber Company assigned the policy in question to Dunn as security for the note shows that there was no agreement that he was to look to the Orchard Land and Timber Company to pay the note. There was no showing whatever that the note given by the plaintiff in this action was a good commercial paper and collectible. On the contrary, Mr. Hardy testified that about the time his client, O. W. Dunn, secured a judgment against the Orchard Land and Timber Company a new company was organized and the property of the Orchard Land and Timber Company was assigned to the new company and the old one ceased to do business. Further, Mr. Hardy never attempted to collect the judgment against the Orchard Land and Timber Company but sought to garnishee the Maryland Casualty Com-

pany, and when that proceeding was removed to the federal court it was ascertained that the judgment creditor, the Orchard Land and Timber Company, had not even paid its license fees to the corporation department, and Mr. Hardy advanced the money in order to maintain his proceeding. The testimony of Mr. Hardy is most convincing that the note was not given in good faith, but was a scheme upon his part and that of Mr. Brainard, who was the chief stockholder in the Orchard Land and Timber Company, and the organizer of its successor to collect this policy of insurance without performance of the agreements and terms therein contained. The note executed by the Orchard Land and Timber Company is worthless, uncollectible and of no value, because it was hopelessly insolvent, and had no assets or property. (Record, pp. 49-55.)

*Where a note is given in satisfaction of a judgment it must be given in good faith and must be of value and collectible before the judgment debtor suffers a loss.*

Stenbohm v. Brown Corliss Engine Co., 119 N. W. (Wis.) 308, 20 L. R. A. (N. S.) 956. In this case the plaintiff secured a judgment against the defendant, who carried liability insurance. Shortly after the action was instituted, the defendant was adjudicated a bankrupt and a receiver in bankruptcy was appointed. After the judgment, by supplemental proceedings, the plaintiff had a receiver appointed. The receiver then petitioned the bankruptcy court that the trustee in bankruptcy assign and turn over to such receiver the policy of indemnity insurance, which petition was granted,

demand was thereupon made upon the insurance company, and later the receiver filed a petition which set forth that the plaintiff was willing to compromise and settle his claim for \$5000 and would accept the receiver's promissory note for that sum in settlement and satisfaction of the judgment. The court ordered the receiver to execute a demand promissory note to the plaintiff in settlement of the judgment and authorize the receiver to commence suit on the policy of insurance. The note was executed and delivered to the plaintiff, and he satisfied the judgment, whereupon the receiver commenced an action against the insurance company to collect the amount alleged to be due on the policy. After the action was commenced the Brown Corliss Engine Company, the defendant, moved for an order vacating and setting aside the ex parte order, authorizing the settlement and execution of the note and the commencement of the action against the insurance company. The motion was granted, and upon appeal this order was assigned as error. The court says at page 309:

“On its face the action taken was a mere subterfuge, resorted to for the purpose of making a nominal compliance with the terms of the insurance contract. The contract was one which the parties thereto had a right to make, and it would be trifling with its terms for a court to hold that the shadowy payment here attempted to be made conformed to its requirements. There was no bona fide payment of the judgment. The fictitious payment resorted to is too thinly veiled to stand the test of judicial scrutiny.”



In *Kennedy v. Fidelity and Casualty Co. of New York*, 110 N. W. (Minn.) 97, 9 L. R. A. (N. S.) 478, four notes were given by the assured to the judgment debtor, which notes were endorsed by a guarantor, and after the action was instituted \$202 was paid by the assured upon said notes. The insurance policy in that case was one of indemnity and the court found that the transaction was made in good faith. This necessarily must be so, because it is only fair to assume that the notes were of value and could be realized upon by the judgment debtor, else payment would not have been guaranteed and the payment of \$202 would not have been made. The court says:

“So far as the record shows, the assured paid the judgment in *good* commercial paper, and there is nothing upon the face of the transaction to indicate that the arrangement was made for a fraudulent purpose.”

This case is commented upon in *Stenbohm v. Brown Corliss Engine Co.*, *supra*, 119 N. W. 309, where the court says:

“No good reason is apparent why the payment which the contract obligates the assured to make as a condition precedent to his right to maintain an action upon the policy might not be made otherwise than in money, *provided such payment is made and accepted in good faith and there is a bona fide settlement and satisfaction of the judgment secured by the injured employee.*”

This case is cited in *Herbo-Phosa Co. v. Philadelphia*

Casualty Co., 84 Atl. (R. I.) 1097, where the court says:

“The courts have held that a payment in cash is not necessary and may be otherwise made, as, for instance, by a note, provided the judgment against the assured is extinguished and the transaction is in good faith.”

In *Seattle S. & F. Ry. Co. v. Maryland Casualty Co.*, 96 Pac. (Wash.) 509, 18 L. R. A. (N. S.) 121, an employee recovered a judgment of \$25,000 against his employer who carried an employer's liability policy. After the judgment was obtained, the employer refused to settle and the judgment creditor, the employee, sold and assigned his judgment for the sum of \$14,000, which was paid in cash. After the judgment appealed from was affirmed by the superior court of the State of Washington, the assured executed its note to the assignee of the judgment for the full sum of the judgment and costs. The court there found that the transaction was in good faith, and we think that it can be unquestioned because \$14,000 in cash was paid by the assignee of the judgment, and it is very clear that that sum would not have been paid unless the judgment debtor had assets sufficient to satisfy the judgment.

This case is annotated under *West River Coal Co. v. Maryland Casualty Co.*, 48 L. R. A. (N. S.) 196, where the language is as follows:

“It has been held that the execution by an employer who holds an indemnity policy, of his note in good faith, in satisfaction of a judgment against him by an injured

employee, is a payment within the meaning of the provision of the indemnity policy stipulating that no action should lie against the insurer except to reimburse the insured for loss actually sustained and paid by him in satisfaction of a judgment after trial of issue."

Also in 20 L. R. A. (N. S.) 956, the editor says the following in reference to *Kennedy v. Fidelity & Casualty Co.*, *supra*:

"Since that decision was rendered, and in reliance upon the rule enunciated therein and in the cases cited in the note thereto, it was held in *Seattle & S. F. R. & N. Co. v. Maryland Casualty Co.*, 50 Wash. 44, 18 L. R. A. (N. S.) 121 that the execution by an employer of his note in good faith, in satisfaction of a judgment against him, obtained by his employee, was within the meaning of an indemnity policy which provided that no action should lie against an insurer as respects any loss except to reimburse the injured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

In *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 132 Pac. (Wash.) 393, a promissory note was given to the holder of a judgment under the authority and with the sanction of the probate court, and in that case it must be assumed that the good faith in the transaction was beyond question and the note given by the assured must have been collectible. After the note was executed by the assured he brought an action against the insurer.

The defense was made that the note was not given

in good faith with the intent that it should afterwards be paid. The court says:

“But we fail to discover in the evidence anything that seems to justify this conclusion. The direct evidence of the parties making the settlement is to the contrary, and it will be remembered that the terms of the proposed payment and satisfaction were made known by the administratrix to the judge sitting in probate and receive his sanction and approval before the settlement was made. It seems to us that this latter fact is alone sufficient to dispel any idea of bad faith that might arise upon the transaction itself, and sufficient to require some direct and cogent proof of bad faith before it can be held that the transaction is not what it purports to be.”

In all the cases where a promissory note is given in payment of a judgment the courts hold that the transaction must be in good faith and the note must be of value and collectible. We submit that the Orchard Land and Timber Company and Dunn, through his attorneys, have not acted in good faith, and that the note which was executed was not received with the understanding that it should be paid, and further it is entirely worthless and uncollectible. The whole transaction was a subterfuge to make recovery upon the policy of indemnity insurance possible.

The defendant in error has suffered no loss, nor has it sustained damage by the execution of its note. The satisfaction of the judgment is in the nature of a receipt and was fully explained and qualified by the testimony of Mr. Hardy.



## 23 Cyc. 1497.

The satisfaction of the judgment obtained by Orchard Land and Timber Company could be vacated and stricken off because it was obtained without consideration and upon a consideration which has failed, or because there is failure to perform the conditions of the settlement between the parties.

## 23 Cyc. 1500.

The plaintiff alleges that it has performed all the agreements and conditions upon its part to be kept and performed and has paid the judgment for the sum of \$7602.60. This allegation is denied by the answer. Under general denial fraud or collusion can be raised.

Campbell v. Maryland Casualty Co., 97 N. W. (Ind.) 1027.

In this case the defendant set up in its answer that the judgment was not paid in good faith and the money was in fact advanced by the attorneys of the employee of the plaintiff. The plaintiff filed a demurrer to this answer which was overruled, and such ruling was assigned as error upon appeal. The court says:

“The facts stated in this paragraph of the answer show that the Carmichael judgment was not paid in good faith before the commencement of this action. If it is necessary to a recovery by plaintiff that he should allege and prove that the judgment upon which he bases his claim, or some part of it, has been paid, then the facts alleged in this paragraph of the answer could be properly

proved under the general denial and a ruling on demurrer, if wrong, would be harmless."

At the trial of this case the defendant in error made the point that the Maryland Casualty Co. should be estopped from denying its liability because it assumed control of the defense of the action in the state court under the terms of the policy. The fact that the insurer assumed control of the defense does not affect the rights of the parties.

Fidelity & Casualty Co. v. Martin, 173 S. W. 307.

The court says on page 310:

"But there is nothing in any provisions of clauses A and E which actually or by implication declares that in the event such defense as appellant might make to an action brought against the assured for damages should be unsuccessful, it would pay the judgment. The amount of payment is confined to and provided for in clause K. It would therefore seem to follow that the fact that appellant made defense for the assured or his administrator in the action for damages brought by appellee, did not estop it from denying liability under its policy in the present action"

To the same effect are

Carter v. Aetna Life Ins. Co., 91 Pac. (Kans.) 178; 11 L. R. A. (N. S.) 1155;

Cayard v. Robertson, 131 S. W. (Tenn.), 864; 30 L. R. A. (N. S.) 1224.

From the above reasons, it is apparent that the findings of fact, and conclusions of law herein cannot stand, for the reason that they do not cover the issues presented by the pleadings, or are they justified by the evidence. The court erred in entering judgment against the defendant (Plaintiff in Error), and in favor of the plaintiff, because there is no evidence to justify the same, and the Court further erred in denying defendant's motion for a new trial.

Therefore, it is contended that this case should be reversed.

Respectfully submitted,

WILBUR, SPENCER & BECKETT and  
F. C. HOWELL,

Attorneys for Plaintiff in Error.

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit

MARYLAND CASUALTY COMPANY of Baltimore,  
Maryland, a corporation,

*Plaintiff in Error,*

VS.

ORCHARD LAND & TIMBER COMPANY, a cor-  
poration,

*Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

*Upon Writ of Error to the District Court of the United  
States, for the District of Oregon.*

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Filed

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**STATEMENT OF THE CASE**

The statement of the case contained in the brief of plaintiff in error, is correct as far as it goes, but in addition to what is therein contained, it should be stated that at the trial the plaintiff introduced in evidence the note described in the complaint, which was marked Exhibit "A,"



and a certified copy of the records of Lane County, Oregon, showing satisfaction of the judgment against the plaintiff, which was marked Exhibit "B." Thereupon the plaintiff rested. No motion for judgment was then, or at any time made by the defendant, and nothing was done by the defendant except to call as its witness, Charles A. Hardy. After taking the testimony of that witness, the case was submitted to the court, and thereafter the court rendered an opinion to the effect that the plaintiff was entitled to recover the full amount covered by the policy (p. 42 Trs.), and thereafter made and entered a general finding accordingly, upon which the judgment was entered from which this writ of error is prosecuted. No exceptions were saved by the defendant, to any of the rulings during the progress of the trial.

## ARGUMENT

### POINT I.

The case having been tried without a jury, the findings being general, and no rulings during the progress of the trial having been excepted to, there is nothing for this court to review.

Sections 649, 700, Revised Statutes.

Norris v. Jackson, 9 Wallace, 125, 128; 19 L. Ed. 603;

Mason v. Smith, 191 Fed. 502;

J. W. Paxson Co. v. Board, 201 Fed. 656;

National Surety Co. v. Cincinnati Etc. Co., 145 Fed. 34;

Barnard v. Randle, 110 Fed. 906;

Fitzgerald et al v. Bossford, 142 Fed. 134;

Keeley v. Company, 169 Fed. 598;

Continental etc. Bank of Chicago v. Cobb, 200 Fed. 511.

## POINT II.

The giving of the promissory note and the satisfaction of the judgment, constituted payment of the judgment, against plaintiff, and therefore a loss under the terms of the policy.

Kennedy v. Fidelity etc. Co. (Minn.), 110 N. W. 97;  
9 L. R. A. (N. S.) 478;

Gardner v. Cooper (Kans.), 58 Pac. 230;

Seattle etc. Co. v. Maryland Casualty Co. (Wash.),  
96 Pac. 509; 18 L. R. A. (N. S.) 121;

Taxicab Motor Co. v. Pacific Coast Casualty Co.  
(Wash.), 132 Pac. 393.

## POINT III.

Bad faith, collusion or fraud to be available, as a defense, must be pleaded.

Springer v. Jenkins, 47 Or. 506.

Buchtel v. Evans, 21 Or. 309.

Jamieson v. Coldwell, 23 Or. 144.

## THE SCOPE OF THE REVIEW

It was early decided by the Supreme Court of the United States, in the case of *Norris v. Jackson*, *supra*, that where a civil case is tried before the court without a jury, two kinds of findings are provided for, namely; general and special, and that,

“If the verdict be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions, or as may arise on the pleadings.”

This case has been followed in many subsequent decisions of the Supreme Court. See page 503, of the opinion in *Mason v. Smith*, 191 Fed. Thus in *J. W. Paxson Company v. Board*, *supra*, Sections 649 and 700 of the Revised Sta-

tutes are quoted and construed. Here the trial court rendered an opinion (which is set out in full), in accordance with which the judgment was entered, whereupon a bill of exceptions was allowed, the exceptions being to the alleged findings of fact, the findings being challenged as unsupported by the evidence. After quoting the statutes above mentioned, the court says, on page 660:

“We are of the opinion that the finding of the court was general and not special, and therefore like the verdict of a jury is not reviewable by this court. No request was made for special findings, and unless some other request, or motion equivalent to a motion for peremptory instructions or judgment non obstante verdicto was made, with proper exception to the refusal thereof, the findings of fact cannot be the subject of assignments of error.”

If it is argued that there is no evidence to support the judgment, and that this can be raised by way of assignment of error in this court, then a complete answer to that argument is found in *Keeley et al v. Company*, *supra*. Here the court made a general finding upon which judgment was rendered; error was assigned on the ground that there was no evidence to support the judgment, concerning which the court says:

“This is a question of law, one upon which the trial court was not asked to pass, and upon which it never did pass. As this is a court which, in actions at law, can only correct errors committed by the trial court, there appears to be nothing for our consideration.”

The court then quotes section 700, and the following from the case of *Cooper v. Omohundro*, 19 Wallace 65, where the issues of fact were submitted to the Circuit Court, and the finding is general: “Nothing is open to review, . . . except the rulings of the circuit court in the progress of the trial, and the phrase ‘rulings of the court in the progress

of the trial' does not include the general finding of the circuit court nor the conclusions of the circuit court embodied in such general finding." Several cases are then cited, and the opinion continues: "The question of law whether on all of the proofs the judgment can be sustained is not self-assertive. It commands consideration only when raised by some appropriate motion and on due exception taken to an adverse ruling thereon by the court."

We deem it unnecessary to quote further from the decisions on this point, as the rule is sustained by so many decisions, while we have not been able to find a case the other way. The court will bear in mind that not a single ruling of the trial court was objected to, and not a single motion of any kind was made by the defendant, nor was there any request made for either general or special findings, so that the matters sought to be presented in this court, were in no manner presented to the trial court, except by a motion for a new trial, for which, of course, there was no basis in the record. It seems to us that there is nothing here for review, and that therefore it is scarcely necessary to consider any of the other features of the case. However, we will briefly discuss the question of payment of the judgment, which involves a further question of whether or not the plaintiff has suffered loss under the terms of the policy from liability imposed by law.

### THE LOSS SUFFERED BY PLAINTIFF

The plaintiff was insured by the defendant against accidents to employees of plaintiff. Dunn, an employe of the plaintiff, suffered an injury while the policy was in force, in consequence of which he recovered judgment against the plaintiff for more than the amount of the policy. The defendant under the terms of the policy, took charge of the



litigation, but at the end thereof refused to pay any part of the judgment. Dunn then issued execution upon the judgment and sought to garnish the defendant, but these proceedings were dismissed. Thereupon Dunn made settlement of his claim against the plaintiff, by accepting the plaintiff's promissory note, payable in ninety days, for the full amount of the judgment, and satisfied his judgment of record. The plaintiff then commenced this action to recover under the policy, claiming that it had paid the judgment. The answer raised the issue of payment and the accrual of any loss, but in no manner pleaded bad faith, collusion or fraud between the plaintiff and Dunn. Nor was there any evidence offered in support of any such defense. It would seem therefore that the sole question upon this phase of the case is one of law, namely; whether or not the execution, delivery and acceptance of the promissory note, and the satisfaction of the judgment obtained by an employee against the assured, is a loss within the meaning of the terms of the policy. This question has been passed upon by the courts several times, and some of the leading cases are cited in this brief. In the Kennedy case, *supra*, decided by the Minnesota Supreme Court, the language of the policy was that no action should be brought except "by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment." An employee of the plaintiff having been injured, obtained a judgment against the insured, which was satisfied upon the delivery by the insured of four promissory notes covering the amount of the judgment, payable to the employee. And thereupon an action was brought against the insurance company. The identical question sought to be raised in this case was here considered. We can do no better than to quote the following from the opinion of the court:

"The contract contemplates that an actual loss shall

be sustained and paid before the company becomes liable, and appellant submits that by the fair and reasonable meaning of the language the assured cannot accomplish payment or satisfaction of the judgment in any other way than by actually parting with the cash. It is admitted that the debt and judgment was paid and satisfied by the execution of the promissory notes, if given in good faith. But the whole argument of appellant rests upon the claim that the mere giving of notes did not amount to a loss actually sustained, for the reason that the maker of the notes, and the guarantor may never be called upon to make payment, might become insolvent, that there is no certainty that they will ever be paid, and, if not paid, there is no loss actually sustained, . . . Fairly construed, the language means simply that the judgment must be paid and satisfied within sixty days from date of its entry, and, when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment.

“If the assured accomplished the satisfaction and payment of the judgment by executing and delivering the promissory notes above described, the good faith of that transaction was hardly open to question, even though it gave the assured the advantage of collecting from appellant company the amount of insurance before the notes came due. So far as the record shows, the assured paid the judgment in good commercial paper, and there is nothing upon the face of the transaction to indicate that the arrangement was made for a fraudulent purpose.”

The Washington case of *Seattle etc. Company v. Mary-*

land Casualty Company, *supra*, is squarely in point. It was brought against the plaintiff in error in the case at bar, upon a policy similar in its language to the policy under consideration, and the precise question sought to be reviewed here was there decided. The assured had delivered a note to cover the judgment, which was satisfied. It was argued that there was no loss under the policy, which was answered as follows:

“The argument is made that there is no loss within the meaning of the above until cash has been actually paid in satisfaction of the judgment, . . . The execution of a note in exchange for satisfaction is, in legal effect, equivalent to the exchange of property therefor. It confers a right to invoke legal process, to seize and levy upon property in value equal to the amount of the note.”

The court cites with approval, the case of *Bausman v. Credit Guaranty Company* (Minn.), 50 N. W. 496, referred to in the *Kennedy* case, and also the case of *Gardner v. Cooper*, *supra*, and other cases, and quotes the note to the *Kennedy* case found in 9 L. R. A. (N. S.) 478, as follows:

“The conclusion reached in the above case, that the giving of a note amounts to a loss actually sustained by the person indemnified within the meaning of a contract of indemnity, where the note is accepted by the creditor as actual payment and satisfaction of the original debt, has the sanction of all the authorities.”

In *Taxicab Motor Company*, *supra*, the defendant had insured the plaintiff “against all loss or expense resulting from claims upon the assured, for damages on account of bodily injuries, or death accidentally suffered,” by the employees of the plaintiff.” And it also contained the following:

“No action shall lie against the company for any loss under this policy unless it shall be brought by the



assured to reimburse him for loss actually sustained and paid by him in satisfaction of a final judgment, etc.”

One of the employees of the plaintiff having been killed his administratrix brought an action against the plaintiff and secured a judgment, which the insurance company refused to pay. The plaintiff thereupon procured a satisfaction of the judgment by executing and delivering to the administratrix, its promissory notes for the amount thereof. In this case the insurance company raised the issue of good faith in the transaction. A settlement was made under the authority of the probate court, but that does not alter the principle involved in any manner; and in answer to the argument advanced by the insurance company, the court said:

“It is no answer to say that the note may never be paid at all, or that it may be compromised and settled for less than its full amount after the assured is reimbursed by the surety company. This can happen no matter how the note is paid. Had the assured paid the judgment in cash out of its own funds, or paid it in money borrowed from another, there could be a secret agreement to repay it, or some part of it, to the assured after the collection is made from the insurance company. But this is beside the question. The real question is, is there such an agreement? And before this question can be answered affirmatively, there must be some satisfactory evidence to that effect. In this record, as as we say, there is no such evidence.”

It seems to us that no language could be more pertinent to the case at bar than that found in these cases. When the defendant merely alleged that the judgment had not been paid, it evidently considered that the only question involved was whether or not payment could be made, of the loss sustained by the assured by the giving of a promissory note. The cases referred to in the brief of the plaintiff in error, and bearing upon the question of whether or not the



giving of a promissory note is payment, are not in point, for two reasons: First, under some circumstances a promissory note, when tendered as evidence of payment of a debt, as well as a receipt, may be shown not to be a payment of the debt or obligation; and, second, the production in evidence of a promissory note or receipt, is prima facie evidence of payment. In this case there is something more than a promissory note or receipt. There is a satisfaction of an employee's claim and judgment in such a way as to absolutely extinguish it. Dunn himself has certified upon the records of Lane County, that the judgment is paid. He is certainly estopped from insisting at any future date that the judgment is not satisfied. But assuming for the sake of the argument that he could show that he did not accept the note in satisfaction of the judgment, and that the entry upon the records does not mean what it purports to mean, and that the judgment is still alive, because the whole transaction was merely colorable and collusive, nevertheless the court cannot draw that inference from this record because the defendant offered no evidence in support thereof and did not plead it. The argument that the assured and the employee have resorted to this method of collecting from the insurance company, amounts to no more than to say that they have resorted to a legal remedy available to them.

We submit that, beyond the technical rules of law in a case of this kind, there is a rule of common justice which requires that the insurance company shall comply with the terms of its policy and liquidate this claim. It accepted the premium of \$140.00 from the plaintiff in this case. A loss accrued. Everything contemplated in the contract of insurance requisite to fix liability upon the insurance company has occurred, and the company should pay the loss.

The case of *Cranston v. Company*, 63 Ore. 427, is cited by plaintiff in error. This was an action by the beneficiary

under a life insurance policy against the insurance company, and the defense in part was that the premium had never been paid, it appearing that the assured had given a promissory note for the premium but had not paid the note.

The whole substance of the case is that the agreement between the insured and the company was, that before any liability should attach under the policy, the promissory note must be paid, which of course, at once shows that this case has no relevancy to this discussion. If the agreement between Dunn and the plaintiff here, had been that the judgment should be satisfied when the note was paid, and not until then, the case cited would be in point; but here the note was accepted as payment and the judgment satisfied. Nor is the *Leschen* case, 173 Fed. 855, cited by plaintiff in error in point. The question there was, whether or not the giving of a note for a certain amount was intended by the parties as payment, the court putting it this way:

“Does this agreement evidence the intention of the parties to it that the title to this property should pass to the vendee when the latter gave its 60-day note? The purpose of all interpretation is to ascertain and to give effect to the intentions of the parties expressed by their writings.”

The court found after considering the facts and the writings, that the parties did not intend that the note should operate as a payment. The satisfaction of a judgment was not involved in this case, and whether the acceptance of a promissory note is payment or not, of an obligation, the release of a judgment on account of which the note is given, certainly extinguishes the obligation, and no other inference can be drawn from the action of the parties. Without consuming more space in a discussion of the authorities relied upon by the plaintiff in error, we submit that each and everyone of them will be found, upon examination to be

clearly distinguishable from the case at bar, and no authority for the argument advanced by counsel.

**BAD FAITH, COLLUSION AND FRAUD TO BE AVAILABLE, AS A DEFENSE MUST BE PLEADED.**

Section 73, L. O. L., is to the effect that the answer must contain general or specific denial of each material allegation of the complaint controverted by the defendant, and may contain a statement of any new matter constituting a defense. This section has been many times construed, and it has been uniformly held that, as the defendant can only prove such facts under the denials as go to disprove the plaintiff's cause of action, if he intends to rest his defense upon any other matter, such as payment, estoppel, fraud, illegality of consideration, etc., he must plead the facts constituting such defense. See *Springer v. Jenkins*, 47 Ore. 506, and cases there cited. This construction of the statute has never been departed from. The defendant therefore could not have introduced any evidence in support of its claim now made, of bad faith, or collusion. But as this defense was neither pleaded, nor in any way brought before the court, it is needless to discuss it.

We respectfully submit that the judgment should be affirmed.

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